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Supreme Court of the United States

OCTOBER TERM, 1963

No. 447

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation and
ASHLO COAL COMPANY, *a corporation*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (called "UMW") prays that a writ of certiorari issue to review (1) the judgments and orders of the United States Court of Appeals for the Sixth Circuit,[1] entered in Case No. 14,832, styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs-Appellees,*[2] v. *United Mine Workers of America, Defendant-Appellant*, on February 16, 1963, wherein the Sixth Circuit affirmed a judgment entered by the United States District Court for the Eastern District of Kentucky (Jackson Division)[3] in its Case No. 284 on June 7, 1961 of $250,000.00

[1]Herein called "Sixth Circuit".

[2]Plaintiffs-Appellees are called "Sunfire" and "Ashlo", respectively. Collectively, they are called "Companies".

[3]Herein referred to as "trial court" or "district court".

in favor of Sunfire and $14,000.00 in favor of Ashlo, both with costs; and the district court's order dated June 27, 1961 and entered June 28, 1961 denying UMW's motion for judgment in accordance with motion for directed verdict or for a new trial, and (2) the Sixth Circuit's order of June 10, 1963 denying UMW's petition for re-hearing.[1]

A certified appendix record, together with the proceedings in the Sixth Circuit, is furnished herewith in accordance with the Rules of this Court.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A to this petition (pp. 1-5a); in the certified appendix record (Vol. II); and it is reported in 313 F. 2d 108. No written memorandum was handed down by the district court.

JURISDICTION

Judgments of the Sixth Circuit, of which complaint is made herein, were entered on February 16, 1963 and June 10, 1963.

This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

In their complaint, Companies alleged "The Court has jurisdiction . . . by virtue of . . . Section 303" of the Labor Management Relations Act, 1947, (herein called "Act"). [4a, 6a].

QUESTIONS PRESENTED

1. Where union members, at a union's direction, strike to obtain execution of a collective bargaining agreement

[1] Judgments and orders of both the Sixth Circuit and the district court in Case No. 14,832 appear in Appendix B hereto, pp. 6-7a.

by each of 176 coal companies, formerly contract signatories, in the same coal field area, and the operator-lessee of a coal tipple and the tipple's owner in the same area also refuse to sign such contract, as do coal producers selling their coal to the operator-lessee at a delivered price and truckers hauling coal to the tipple where the tipple operator processes and prepares it for interstate shipment and sale by the tipple owner, does picketing activity by striking tipple employees and others

(1) stationed at the entrance to the road which leads to the tipple, and directed at truckers or their employees; and

(2) stationed at switches on railroad tracks leading to the tipple, and directed at train crews placing and pulling cars to and from the tipple,

each, constitute secondary boycott conduct banned as activity within the scope of Section 303, Labor Management Relations Act, 1947, so as to be the basis for damage awards thereunder?

2. Is a jury verdict of union responsibility and money damage awards proper under Section 303, Labor-Management Relations Act, 1947, or for a common-law claim where, in interrogatories submitted by the trial court to the jury, the standard of union responsibility and damages alike is permitted to be based upon conduct of union members and is not made to depend upon union agency?

3. Where plaintiffs are awarded money judgments in an action against a labor union based upon a violation of Section 303, Labor-Management Relations Act, 1947, or for a common-law claim; and plaintiffs' proof includes evidence of dynamitings of their properties and the burning of a tipple during a strike, and admittedly there is no positive evidence of the fire's origin or who caused it or

the dynamitings and no evidence of an agency relationship between the tortfeasor and the labor union, (1) is evidence by other coal producers and tipple owners in the same coal field area, showing they suffered similar property damages both during and after the same strike, properly admissible, in the total absence of identification of the tortfeasor and of an agency relationship between such tortfeasor and the union; and (2) does such evidense warrant the jury inference therefrom that union agents damaged plaintiffs' properties so as to support the jury awards against the labor union?

4. (a) In an action for damages instituted under Section 303, Labor-Management Relations Act, 1947, by an employer against a labor union and there is joined with a claim under the statute a non-federal, common-law action for tort, did the trial court commit reversible error in submitting an interrogatory to the jury which imputed responsibility to the union for conduct of union members and which interrogatory was inconsistent with pleadings and without evidentiary support, and where neither the jury's charge nor the interrogatory apprised the jury of the elements essential to a finding that the statute had been violated, and the trial court refused instructions which would have so apprised the jury?

(b) Was the appellate court correct in refusing to consider the defendant's objections to the jury charge, the trial court's ruling on interrogatory 1 and the trial court's refusal to give instructions requested by the defendant union on the ground that it had not met the requirements of Rule 51, Federal Rules of Civil Procedure? and

(c) Even if the objections made by the defendant union did not meet Rule 51's requirements, was the trial

court under a duty correctly to instruct the jury in the furtherance and interest of justice?

5. Whether, under the evidence, the appellate court correctly appraised Sunfire Coal Company as a person who is permitted to maintain an action as a plaintiff under Section 303 of the Labor-Management Relations Act, 1947?

6. In an action instituted in a federal district court by an employer against an unincorporated labor union in its common name for damages and the district court's jurisdiction is asserted under Section 303, Labor-Management Relations Act, 1947, and there is no diversity of citizenship of the parties, (a) does the district court have jurisdiction, power and authority under the doctrine of pendent or ancillary jurisdiction to determine the issues in a non-federal tort action joined with a claim under said section, where state courts in the state in which the alleged wrongful conduct occurred and wherein the federal district court is sitting would not entertain jurisdiction of a suit based upon the non-federal claim against the union in its common name; and (b) does the doctrine of federal preemption preclude the applicability of the pendent or ancillary jurisdiction in such action?

STATUTES INVOLVED

Pertinent statutory provisions involved are Labor Management Relations Act, 1947, Sections 2(2) and (3), Section 13 and Section 303(a) and (b) [29 USCA 152(2) and (3), 163 and 187(a) and (b)]. They appear in Appendix C hereto (pp. 8a, *et seq.*)

STATEMENT OF THE CASE

1. THE JUDGMENTS OF THE DISTRICT COURT AND OF THE SIXTH CIRCUIT.

Asserting jurisdiction under the Act's Section 303, Companies charged UMW with responsibility for strike

activity in March, 1959 and thereafter and for attendant property loss to Sunfire and business and profits loss to both Sunfire and Ashlo.

In a jury trial, wherein UMW motions to strike the evidence "not connected up to" UMW and for directed verdicts were denied (283a, 284a, 331a), the district court, on jury answers responsive to interrogatories (11a, 352a, 367-9a), entered judgments on June 7, 1961, that Sunfire recover of UMW $250,000.00 and that Ashlo recover of UMW $14,000.00, each with costs (A. 6a).

Thereafter, on June 28, 1961, the district court entered an order, dated June 27, 1961, overruling UMW's post-judgment motion to set the jury verdict and the money judgments and for judgment in accordance with UMW's directed verdict motions or, in the alternative, for a new trial (A. 6a).

Upon UMW's appeal, the Sixth Circuit by judgment of February 16, 1963 (A. 7a), and based upon an opinion (A. 1-5a) of the same date, affirmed the judgments against UMW. A rehearing petition was rejected on June 10, 1963 (A. 7a).

2. THE ISSUES AND HOW THEY WERE DECIDED

a. The Issue of Liability Under Section 303

Sunfire owned a coal tipple at Combs, Perry County, Kentucky, which it leased on May 13, 1958 to Ashlo (49a). They maintained offices in common (21a). Ashlo's General Manager Mathis was Sunfire's assistant to the general manager (21a). Neither produced coal (20a). Ashlo bought coal from 10 to 15 small mines (20a) and, with 8 or 10 employees, processed it, loaded it in railroad cars and readied it for market (20a, 40a). Coal was hauled to Ashlo's tipple by trucks, some of which were driven by owners thereof and others by owners' employ-

ees. There is testimony that neither Ashlo nor Sunfire had any control over the drivers (24a, 210a), hired them (93a, 171a) or directed their work (87-8a, 93a, 99a, 210a), and that Ashlo did not pay the truckers (24a), coal being delivered to Ashlo at "a delivered price" (24a).

Ashlo had no sales organization (56a), but Sunfire, whose employees were its corporate officers, an engineer and a few construction employees at the tipple, undertook to sell the coal.

The National Bituminous Coal Wage Agreement of 1950 was amended in 1958.[1] When 176 former contract signatories refused to execute it, UMW's District 30 sent them contract termination notices (223a, 229a, 298a), offering to negotiate a new agreement (229-30a). In meetings held March 14 and 15, 1959, District 30 President Hibbitts, explaining that some operators had not signed, advised UMW members of the necessity of picket lines. Instructions to and by District 30 field representatives and to UMW members alike, the undisputed testimony shows, were that picketing activities were to be peaceful and without weapons (224a, 230a, 294a, 299a).

Picketing commenced March 16.[2] To ascertain which mines were working, the men proceeded in a motorcade, accompanied by state police (115-6a, 300a). This lasted only three days (108a, 299a). Then picket lines were established at different locations (299a) and continued until April 30, when the National Labor Relations Board obtained an injunction (235a, 239a). *After April 30 there was no authorized picketing* (235a).

In March, 1959, neither Sunfire (42a) nor Ashlo (24a) was "under contract" with UMW (303a). Both refused to sign the 1958 Agreement (25a, 36a, 46a). Included in

[1] Herein called "1958 Agreement".

[2] Unless otherwise indicated, all dates refer to the calendar year 1959.

the operations picketed was the Ashlo tipple. Aside from the mines which produced coal sold to and processed at the Ashlo tipple, there is no evidence of any business relationship between Companies and the remaining 176 companies from which District 30 sought UMW contracts.

(1) PICKETING AT THE ASHLO TIPPLE

Pickets are stationed across river from tipple

Ashlo's tipple is located four miles from Hazard, Kentucky. A highway bridge crosses Kentucky Route 80 about one-fourth of a mile up the river from the tipple. At the end of the bridge nearest Hazard, a truck road leaves the highway and goes "down under the state highway bridge and out to the tipple" (302a). A picket line, maintained night and day, was composed of former employees on strike for better wages and of people living in the neighborhood (78a, 309a).

According to Ashlo's General Manager Mathis, fifty to three hundred pickets were there all the time until state police moved them "off our property" about the last two weeks (27a), although there is testimony these pickets were stationed on property not owned by Sunfire or Ashlo (307a) across the Kentucky River from the tipple and the road leading to it. Undisputed, however, is the testimony that between the pickets and the tipple, state police were stationed both "at the mouth of the road going under the bridge" and also "over with the pickets at the other end of the bridge" (38a, 302-3a).[1] John Stubblefield and Steve Fields were in charge of the picketing by direction of District 30 Field Representatives Matt Combs or Bill Perkins (298a, 309a).

Picketing events on March 16, 30 and 31

The tipple did not operate March 16 because at least

[1] See drawing of the location of the tipple, roads and river (354a).

five former tipple employees out of 8 or 10 Ashlo employees joined the picket line. Among former employees who joined the pickets was James Morris. At first there were 15 or 20 pickets (64a), but according to Mathis, traffic later was "all tied up" although "they weren't all pickets" (26a), and there were several hundred pickets "on the highway, over on the shoulder on the right-of-way" and on Sunfire property (26-7a).

Ashlo did not try to operate the tipple until March 30, when, at Mathis' suggestion, the men returned but "didn't go to work" (29a). However, Ashlo hired "every man that come around on the premises that wanted a job" and the tipple operated on March 30 (30a). Four or five of the strikers came into the tipple and asked Mathis "to shut the tipple down"; Mathis refused; and Mathis related—and it was denied (296a)—"one of them pushed a couple of men off the tipple" (30a). That day a picket stopped a crusher; Mathis shut the tipple down. *After each incident, work was resumed* (31a).

The next day, 50 to 300 pickets, as Mathis estimated, were stopped by state police from coming to the tipple; and it operated (31a). One employee credited Perkins saying there would be no work until a contract was signed (170a).

On March 31, with 17 or 18 state troopers present, an estimated 50 or 60 pickets, described by a trooper as "fairly well behaved" (152a), were stopped from going to the tipple by the troopers (151-2a). Later, 3 or 5 women (152a, 179a) appeared and two of them, going through the troopers' cordon line, "got the men . . . excited", and state police arrested Jasper Wright for attempting to incite a riot (152a), but no action was ever taken on the arrest (154a). A trooper stated he saw Field Representative Perkins there, agreed he may have left, and admit-

ted that after Bill Perkins returned, there was no further trouble (155a), although 25 or 30 pickets remained (179a).

Picketing Events on April 24

There was evidence that on April 24 pickets appeared at Combs in large numbers.[5] Though one trooper did not see Bill Perkins until after the incident described below had occurred (159a), another related he saw Perkins and asked his assistance in unblocking the road and declared Perkins inquired if the trooper had asked the men not to do so. When pickets attempted to go down the side road under the bridge, several troopers, out of 12 then present, stopped them (112a); by agreement with the troopers, three pickets, accompanied by a trooper, had a discussion with Companies' Mathis, who related the pickets wanted him to close the tipple down; he refused; and upon his statement that Companies offered to meet with UMW to negotiate a contract "we can live by" and "stay in business", the pickets stated, "Well, we've got a contract here you can sign and take it" (36a). Two strike breakers, present on the occasion, admitted pickets told them "we were taking other people's jobs" (180a), and that they would give them a voucher and feed them if they would not take their jobs and would join the strike (187a). One strike breaker charged a picket with the statement that if Mathis would not close the tipple, trucks would be stopped at the bridge and "if you don't get any coal, I guess you will close it down" (37a, 181a); and a truck driver charged pickets said, "Go ahead and let him dump, he won't be hauling there long" (96a). Pickets dispersed when instructed by Perkins (113a).

A picket, testifying for Companies, related that when the pickets started to disperse, Perkins told him "to go

[5]Mathis testified "it looked like there was a thousand" (35a).

home" and "That we didn't have to come down any more, that they would take care of it (216-7a), meaning, "Take care of the mine" (218a).

The Ashlo tipple burns on April 25

The Ashlo tipple burned shortly after 6:00 a.m. on April 25.

The picket line, composed of 12 or 15 men (291a), *was across the river from the tipple* (160a, 291a). Nine troopers arrived around 6:00 a.m. (160a). Prior to the fire, *three carloads of state police* were stationed so that one group was "on each side of the bridge, each side of the river" (292-3a) and between the picket line and the access to the Ashlo tipple (160-1a). Prior to the fire one car of troopers was sent "up on the bridge", and one car was kept "this side of the bridge, on the Combs side of the bridge" (160a).

Trooper John Hill could see the tipple from where he was stationed and saw a man running from the tipple's left side into the mountains behind the tipple (162a), but could not identify him at that distance. Within 15 minutes, he noticed the fire. The man did not come out of the mountain (162a).

State police detective Wood began investigating "about 6:20 to 6:30" (163a). Back of the tipple (163-4a), he found "signs going up the back of the tipple" to a slate dump, "where a person had come down over the slate dump" and had gone back into the woods to the left of the coal tipple. Wood was advised "there had been some guards there that night" who were not then present, but that there "was a lady there when I got there and one gentleman, a part owner of the company". He trailed the footprints with bloodhounds down the river and found a U. S. Army belt about 200 yards up the hill,

"where a person or persons had been sitting" (164a). He found "at least two persons' tracks" had gone down the river and "following the bloodhounds to a foot-bridge some miles down the railroad track" where he lost track of any sign of any person "because across the bridge and near the end of the bridge there had been a fresh car sign" (164a). The car came back towards Combs (165a). Wood was never able to pick up the trail or to ascertain or identify the person or persons who set the tipple afire (165a).

Six guards, on duty at the Ashlo tipple prior to its burning on April 25 (165a), were supposed to work a 12-hour shift, from 6:00 p.m. to 6:00 a.m., but admittedly left early April 25. Two fixed the time of leaving as "about 5:30" (189a, 199a), while others fixed it at 6:00 a.m. (193a, 195a). The guards claimed they left together in one automobile (189a, 193a), although one believed there were "just four" with him that night (191a).

The guards were the "closest to that tipple" (166a). The "next closest people to the tipple" were the state patrolmen on the bridge (166a).

There is a railroad track near the Ashlo tipple (354a), which is used by persons as a walkway going to their homes (190a).* People living down the track ordinarily use it near the tipple to walk home; and guards saw unidentified persons around 10:00 p.m. and midnight (190a, 204a).

Another guard related that before the guards drove away that morning, the guards had been all together about an hour (193a). Asked whether anyone left the group in that time or had an opportunity to "set the tipple on fire before you left", two guards answered, "No. I

*A photograph of the tipple is found at 359a, and a "plan view" at 360-1a.

don't think so" (190a, 194a). A third guard admitted the guards had not stayed together "in one little cluster all night" and were separated most of the time (194a); he did not know what the other guards were doing when he wasn't with them; and "It's a possibility" any one of the guards would have had a chance to have planted the fire while he was not with them (195a). *Two guards did not testify.* Four guards (192a, 195a; 197a, 199a) testified the state police were at the end of the bridge when they left.

A Sunfire employee related a coal truck came "down the road", past the picket line during the night of April 24-25; he did not know who was in the truck, but after it passed, he heard dynamiting "Over in the edge of the bottom just below the highway from where we was standing, down below us" (294a).

Ruby Baker charges the tipple burning to James Morris, who denies it. Ruby Baker's admissions impeach her charge against Morris.

Ruby Baker, who on April 24 had resided at Bonnieman, Perry County, Kentucky, related that around 5:00 p.m. on April 24, James Morris brought his wife and children to "stay all night" at the Baker home (204a). Both James Morris and his wife admit this (286a, 289a); but they went at Ruby Baker's invitation, which Mrs. Morris accepted subject to the condition that Morris "would take us" (285-6a), and he acquiesced. Morris did not stay at the Baker home that night (286a, 289a). Morris avowed, and there is no contradictory evidence, "I stayed all night at home" and arose about 6:00 a.m. on April 25 and heard the state police siren. He then "went off the hill" when he first learned the tipple was on fire sometime between 6:00 and 6:30 a.m. (289a).

Ruby Baker's version is, on the morning of April 25, Morris "pulled up into my yard in his car and jumped

out and come running through the house" (204a) and told her "to run out in the yard to the car and get the gun"—a high-powered rifle; she asked him where the gun was and, following his instructions to "Raise the back seat", she got the gun, took it in the house and hid it (205a). According to Ruby Baker, Morris was "dirty" and "all excited" (204-5a). Mrs. Morris, however, denies Ruby Baker got a rifle out of Morris' car or that there was any coal dust on Morris when he came to the Baker home (286a). Mrs. Morris' testimony is Morris said nothing about the tipple except "the tipple was on fire, was all" (286a). Ruby Baker attributed to Morris a statement that, "I guarantee her to go down now, I guarantee the tipple to go down" and that when his wife retorted, "Oh, I bet you", Morris replied, "I bet you; I guarantee her to go down this time" (205a). Morris denied he had anything to do with the burning of the tipple (290a), avowing there has never been any charge made against him by anyone in any court that he had anything to do with the tipple's burning (290a). No evidence contradicts Morris. Mrs. Baker and Mrs. Morris agree they went to the tipple while it was burning (205a, 287a).

Bessie Bryant, wife of an Ashlo employee prior to the 1959 strike (287a), testified Ruby Baker told her if she would make an affidavit that Jim Morris burned the tipple, she would get a thousand dollars which was to be divided between her and Ruby Baker; she refused, telling Ruby Baker "'I don't know that Jim Morris done it" (288a). Ruby Baker denied this statement (207-8a).

However, Mrs. Baker, no longer living at Bonnieman, now resides in Lexington. She does not work there, but gets a government check. Denying she was getting any money from Sunfire or Ashlo (206a), when Sunfire and Ashlo's Mathis was pointed out to her in the courtroom,

she admitted that while living at a hotel in Lexington, Mathis came to her door and handed her $100.00 cash; she also got free hotel room there and free meals for her whole family; and Mathis got her a house in Lexington on Stone Road where she was residing (206-7a). Mrs. Baker admitted she had never gone before the grand jury to tell them anything about Morris' burning the tipple (207a). *Mrs. Baker had never seen Mathis before.* Asked if Mathis "has been an angel since then", Ruby Baker replied, "Somebody has been an angel. I don't know who it has been, but thank the Good Lord somebody has" (209a).

The Sixth Circuit agreed "The record discloses *no positive evidence* of the origin or of the originators of the fire" but declared, without specifying, "there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant" (A. 3a). Though acknowledging that UMW had in detail reviewed the evidence "in support of its argument that the evidence did not support the jury's verdict as to its responsibility for the burning of the tipple", it regarded it sufficient "to say", again without specifying, "that no justification appears for disturbing" the trial court's judgment (A. 4a), thereby avoiding reference to Ruby Baker's admission of her receipt of cash from Mathis at the door to her hotel room, her admission she had never seen him before, her admission of free room and board for herself and children at the hotel and that Mathis had gotten her the house in which she resided in Lexington. *The summary fashion in which it disposed of the incident permitted the Sixth Circuit to avoid the cogent fact that when Mrs. Baker testified, Mathis sat in the courtroom and was not called to explain his economic generosities to Mrs. Baker.*

There was no evidence that Morris was an UMW agent.

Another crucial issue was that of *agency*. The Sixth Circuit's opinion is not responsive to UMW's position that even though the evidence warranted a finding Morris destroyed the tipple (which UMW denies), there remained the issue of agency and *there was no evidence that Morris was an agent of UMW to warrant imputing responsibility to it for Morris' act*. Though the Act's legislative history shows a union member is not *per se* a union agent, and federal courts and the National Labor Relations Board have so proclaimed, the five Interrogatories answered by the jury were predicated upon its belief that conduct had been committed by UMW through or by "its officers, agents, representatives or *members*" (367a), and *the jury*, in formulating its findings, was thus *led to believe, erroneously, that regardless of an agency relationship, acts of members were attributable to UMW*. This was emphasized by the district court's statement to the jury that officers of the union and district "and the members of the union and . . . of the district are largely identical . . . as far as representation of the union is concerned" (340a).

Picketing activities in relation to truckers delivering coal to Ashlo's tipple

Four drivers hauling coal to Ashlo testified either they were afraid of the pickets (71a, 96a, 175a), or they were called "scab" or other obscene names (72a, 88a, 172a) or threatened (89a, 173a) or had rocks thrown at them (101a), yet each admitted delivering every load of coal to Ashlo's tipple (72a, 90a, 101a, 172a), admitting the pickets "never did bother me" (73a) or "No, I never did turn back with one" (90a).

There is evidence that truck drivers encountered roof-

Additional incidents admitted in evidence over UMW objections, and which show total unconcern with the necessity of proving agency are discussed, post, pp. 34-41.

ing tacks on the road leading to the tipple (74a, 94a, 180a). One related he found them in front of Lonnie Wright's house, Wright and Morris attempted to stop men attempting to get the tacks from the road, and that Morris "had a pistol in his front pocket" (76a). Another trucker stated Morris told employees sweeping the tacks from the road to "Let them lay there" (95a).

Similarly, a trucker found his "tailgate had been tripped", about a ton of coal spilled (100a), and his "tires cut" after returning to his parked truck; and while he included Lonnie Wright among three pickets he saw, he did not impute these acts to pickets; when he backed out to go home, about 30 pickets were present and rocks were thrown at him, nevertheless the next day he delivered the coal to the tipple at a time when again about 30 pickets were present (101a). When he reached the bridge, and 200 to 300 pickets were there, one jumped on his truck but did not succeed in getting the door open (101-2a).

A non-union coal producer, who hired three drivers to transport coal to Ashlo, claimed his drivers were stopped at the bridge daily and several times "half-way between the tipple and the bridge" (210a), and related state police would open the road (211a). On one occasion a bottle hit one of the trucks (211a). The drivers did not testify and the producer admitted there were no other assaults on the trucks other than "tripping the tailgates and letting coal out on the road" which occurred just once (211a). He admitted the "balance" of the coal was delivered, as was every other truck of coal he started to the tipple (213a).

Similarly, though "violence on the picket line" has been held "not material" and would not in itself bring complained-of conduct into conflict with the Act's secondary boycott provision (*NLRB* v. *Int. Rice Milling Co.*,

341 U. S. 665, 672), and UMW directed the Sixth Circuit's attention to the predominant status accorded the element of violence by the district court,[11] the Sixth Circuit's opinion does not concern itself with this contention. Similarly, while Companies complained that pickets engaged in name-calling to truckers delivering coal and UMW countered with this Court's rule that name-calling is offensive only when it intimidates and that truckers had delivered to Ashlo all coal designed for delivery there, the Sixth Circuit was unconcerned.

Picketing Incidents relating to the L & N train crew

The L & N Railroad served the Ashlo tipple. Its supervisory employees, as Companies' witnesses, testified the railroad had difficulty in placing and pulling cars to the mines when pickets in groups described as "From small to large"—estimated at 50 or 60—stationed themselves at switches leading to the coal tipple (141-2a); that pickets carried placards reading "On strike, no contract plan, District 30, U.M.W.A." (148a); that "regular train crews wouldn't pass them and the personnel department officials[12] would have to place and pull cars" (142a); but, railroad's regular employees "have long been union men" and would not cross the picket line (144a) and after throwing the switches and starting in, *these officials had no difficulty* (142a). When pickets hollered "at the train crew", they "would get off the train" (28a). *It is also undisputed that the supervisory personnel was "able to render the same service to the mines and the tipples as had been rendered before the strike"* (145a).

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[11] The district court refused UMW's instruction 5 which was based upon the *Int. Rice Milling Co.* case (333-35a).

To show the trial court's emphasis on the element of violence, the district court's charge appears in Appendix D hereto, pp. 23a et seq.

[12] These were "trainmasters and assistant trainmasters and assistant superintendent" and other willing officials (143a).

Railroad personnel recounted that on an occasion after supervisory personnel placed empties and pulled the load at Combs and were in an automobile, some 250 or 300 pickets swarmed around and kept saying to turn the car over, but L & N's traveling engineer pointed out "we got out without too much trouble" (145a) and no attempt was made to turn the car over (149a). Actually, L & N's Deaton testified, it is not unusual for pickets "to get hotheaded and lose their temper and say things that they don't do and probably don't intend to do" and for that reason no attention was paid by the supervisory personnel to the pickets' statement (150a).[12]

Picketing of the switches commenced March 26 and ended April 16, following a federal court injunction obtained by the railroad against UMW (142-3a).

The Sixth Circuit did not answer UMW's contention that train crew incidents did not fall within the Section's scope because no District 30 officer or agent was shown to have been present; that "picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer";[13] that the Act's Section 2(2) and (3) excluded employees subject to the Railway Labor Act.[14] Moreover, UMW pressed upon the Sixth Circuit that this Court's *Local 761* (366 U. S. 667) and its application by

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[12] Deaton also testified that on April 7 at the Monaco Coal Company, when he "went out with a mine crew at Carrs Fork", he encountered a beech log in the middle of the track and some 25 or 30 pickets standing at one side. When Deaton asked that it be rolled off the track, Paul Hurd and two or three others told him, "if we moved that log there would be plenty of bloodshed" (147a); but the train crew moved the log and there was no trouble about it (147a).

[13] *Local 761, Electrical Workers v. NLRB*, 366 U. S. 667, 673-4

[14] These activities occurred prior to the Act's amendments in September, 1959. Discussion of the issue by the NLRB from its 1957 Annual Report appears in Appendix C herein (A. 14a). Pertinent legislative history of the amendments showing the validity of the Board's position and that of UMW herein appear also in Appendix C herein (A. 14-15a).

National Labor Relations Board in *Local Union No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB 127, 129, demonstrate the train crew incidents were not proscribed by the Act's Section 303;* but the Sixth Circuit's opinion is silent thereon.

(2) PICKETING ACTIVITIES AT OPERATIONS OTHER THAN ON COMPANIES' PROPERTIES.

Over UMW objections (110a), the trial court permitted the jury to hear of activities at operations other than on Companies' premises. A motorcade of 250 to 300 cars gathered at Darfork, Kentucky, on March 16 with 300 to 1,000 pickets, which went from place to place, remaining approximately one hour at each place. Mass picketing at Colson caused the road to be blocked on March 17, and a trooper claimed pickets attempted to turn over a coal truck. He recognized District 30's Bill Perkins who was asked to stop the men, which Perkins did after thirty to forty-five minutes. On another occasion Perkins was again asked to assist in having the men disperse: Perkins did so (111a). There was no violence and no trouble on this occasion (112a). On a third occasion at Colson, 1,000 —more or less—pickets were stopped from going to the tipple by 17 or 18 troopers (113a), with Perkins present (114a).

A trooper also told that a large number of women pickets blocked the road of Hardburly when a coal truck driver wanted to go through, and the trooper, telling the men to get the women and the men off the truck and to

*The Board's *Carrier Corporation* case was reversed in *Carrier Corporation v. NLRB*, 2 Cir., 311 F. 2d 135 (Chief Judge Lumbard dissenting); the Supreme Court granted certiorari (*United Steelworkers of America v. NLRB*, 10 L. ed. 2d 410, Case No. 925); and it is now pending, with the following question to be answered:

"Does Section 8(b)(4)(B) of LMRA prohibit union which is engaged in a lawful strike at an industrial plant from picketing at gate through which railroad-owned spur track enters plant, for purpose of inducing persons employed by railroad not to make pickups and deliveries at struck plant?" (53 LRR 165).

open the road", motioned the driver "to go through"; and he did (113a). *No union representative was present* (113a). One unidentified man was arrested and though charges were pressed, the grand jury did not indict him (117a).

At Hardburly, on March 31, a trooper arrested two women among the pickets, for throwing rocks through the windshields of trucks coming in to unload coal (155-6a).

Earl Spencer, who worked on an auger for Chavies Mining Company, testified an auger and shovel were blown up while he was working around July 10 (213-4a). He attributed the dynamiting to Walter Turner who was indicted but acquitted (214-5a).

(3) MEETINGS BETWEEN UMW AND OPERATORS

District 30's President Hibbetts arranged a Washington, D. C. meeting between operators and UMW representatives to talk about a bargaining contract. Present for UMW were its then Vice-President Thomas Kennedy, Tony Boyle, John Owens, Hibbetts and others (127a, 134a). Some twenty coal operators (231a), including non-union operators Richie, Dick Johnson and Stamper Collins (127a, 130a, 134a), who claimed they discussed making a contract "the truck mines could live with" (127a); an operator inquired what could be done to stop the violence in eastern Kentucky, and the response thereto "Sign the contract" (127a, 130a), which Richie attributed to either Kennedy or Owens (127a) while Johnson and Collins charged it to Owens (130a, 135a). *Johnson and Collins both admitted the operators made no actual accusation* that *union officials* had anything to do with the violence (132a, 138a).

A second meeting in Frankfort, Kentucky was attended by Boyle, Hibbetts and others representing UMW (47a,

130a, 133a, 135a). Kentucky's Governor had representatives there (131a), as did the Federal Conciliation Department (132a, 133a). An estimated 25 to 40 coal operators were present (133a, 137a). Non-union operators attributed to Tony Boyle, when asked what might prevent or stop the violence, the reply "Sign the union contract" (47a, 131a, 135a). While Hibbetts stated violence was discussed (236a), Collins, asked whether any operator or person accused UMW of having anything to do with violence, answered, "Directly accused, no, sir, I wouldn't say so" (138a). Hibbetts complained operators were "creating the majority of this lawlessness" (237a), denied the statements attributed to UMW representatives in Washington and Frankfort (231a, 233a, 236a); declared, and his testimony is not contradicted, an *operator from Pikeville* stated *if UMW insisted on the contract, "the Big Sandy River would be running with blood"* (232a); and credited Boyle saying at Frankfort, "we would do what we could to have peace and harmony because we knew way to keep the peace" (234a).

Other conferences were held, too, in Lexington under auspices of the Labor Department's Conciliation Department (232-3a). Hibbetts met too with operators "along with the Ministerial Association, at Whitesburg" (234-5a), and wrote the Sheriffs of Letcher, Perry, Knott and Pike Counties, offering assistance "in every way possible to keep the peace" (234a).

(4) THE SIXTH CIRCUIT HOLDS PICKETING AT THE ASHLO TIPPLE TO BE SECONDARY ACTIVITY.

In the Sixth Circuit, as in the district court,[7] UMW contended, as a matter of law, the evidence did not sup-

[7] UMW's motions for directed verdict (284a, 331a) asserted, "There is no evidence" UMW violated Section 303 and the "evidence fails to show any wrongful or unlawful act for which" UMW "under applicable law may be held liable". See, too, UMW's post-trial motions for judgment in accordance with directed verdict motions (12a).

port a finding that UMW had engaged in conduct banned by Section 303 and had injured Companies' property and business within that Section's meaning. It urged that picketing at the Ashlo tipple was primary, and not secondary, activity; it emphasized the lack of a "neutral employer" heretofore proclaimed to be a *sine qua non* of a secondary boycott under the Act and that picketing was to secure a UMW contract not alone from Companies but also from producing operators and truck drivers' employers; and it repeatedly directed the Sixth Circuit's attention to criteria enunciated by this Court in *Local 761, Electrical Workers v. NLRB*, 366 U. S. 667 (1961) and insisted that implementation thereof condemned any finding that UMW had committed activity banned by Section 303.

In its opinion (A. 1a), it recognized District 30 also sought contracts from 176 coal producers who had not signed the UMW contract; it conceded *"To the extent that such producers had not signed agreements with it, defendant was essentially engaged in negotiation or conflict with them"* (A. 3a), it nonetheless held that picketing at Ashlo's tipple "was not merely permissive primary picketing, but was a secondary boycott within the meaning of Section 303" (A. 4a). It reasoned that, "Faced with the complexity of numerous picketings at separated and inaccessible mine locations, defendant chose the simpler course of closing the outlet provided for the numerous producers by Ashlo's operation of Sunfire's tipple" (A. 3a). To reach its conclusion, the Court "specifically reject[ed] defendant's contention that Ashlo employees were themselves picketing for higher wages" (A. 3-4a), although the unchallenged evidence showed that at least five of Ashlo's eight or ten employees joined the picketing to obtain higher wages (64a, 78a, 180-1a, 187a, 288a). The Sixth Circuit's further reasoning was that "defend-

ant's strategy in attempting to obtain contracts with the 176 producers by concentrating efforts on the smaller number of outlet-operators is further indicated by defendant's attempt to obtain contracts with the latter which would permit them to purchase coal only from producers under contract with defendant" (A. 4a).

The Sixth Circuit's opinion is silent as to UMW's strong position that *Local 761* (366 U. S. 667) challenges the jury finding and the district court's conclusion of UMW liability; and UMW's request that the Sixth Circuit "explain if or why it believes" *Local 761* to be inapposite[5] remain unanswered.

b. The issue of improperly admitted evidence in relation to agency.

In the trial court, over UMW objections (82a, 86a), two employees (83-6a) of doctors who had treated James Morris for injuries were permitted to show that medical bills charged to Morris had been paid by the UMWA Welfare & Retirement Fund (82-4a). Agreeing the Fund was "a separate organization" from UMW (83a) the district court, equating agency with membership, declared "You can show that Mr. Morris . . . was not a member of the union or had no rights in the union (84a). Rejecting UMW's complaint that this evidence was improperly admitted, the Sixth Circuit held (A. 5a): "Whether or not" UMW and the Fund "are separate entities, evidence that the latter had paid medical bills charged to an individual was properly received *on the issue of his relationship with*" UMW.

Likewise, the district court admitted, over UMW objections (80-1a), a state trooper's statements concerning stopping a car, in an area other than at the Ashlo tipple,

[5] See Petition for Rehearing, pp. 4-5.

in which Morris and another person rode on May 14, 1959 —after picketing ceased and after the Ashlo tipple burned on April 25 of that year—and finding ammunition and a gun (80-1a). Admittedly, the trooper did not arrest the men and conceded he did not regard the incident as sufficient to charge either of them (81a). Since the evidence did not show any UMW connection with the incident, UMW moved to have the evidence stricken, which district court denied (283a). To UMW's argument that there was no showing of agency between UMW and either of the persons and its admission was prejudicial, the Sixth Circuit, unresponsive to UMW's position, declared, the district court properly overruled the objection "since the jury had a right to consider this evidence in determining whether there was a concert of action *between the two individuals*" (A. 5a).

Without identifying who had committed the acts and without showing UMW's responsibility therefor, and *over* UMW objections,[1] witnesses told the jury that Companies' properties were dynamited, Companies' Mathis stating they "were dynamited about three different times" (32-3a, 47a, 68a, 88a, 202a). Two of such witnesses admitted not knowing who had done the acts (88a, 177-8a).

Without identifying who had committed the acts and without showing UMW's responsibilities therefor, and *over* UMW objections (122a), eight non-union coal operators and one union operator told the jury that during the strike each suffered property damage by fire or explosion (122-3a, 125a, 126a, 128a, 130a, 134a, 138-9a). None identified the actors; several admitted they did not know who they were (125a, 139a, 140-1a). Though authorized

[1] Objections appear at 32a, 68a, 73a, 177a. In addition, motion to strike the evidence "not connected up" to UMW was rejected (283a). See too UMW's post-trial motion for judgment or new trial overruled by the district court (13a, 17a).

picketing ceased after April 30, 1959, two incidents occurred in July or August, 1959, one in May, 1959 and another in March, 1961 (128a, 140-1a).

In its opinion (A. 4a), the Sixth Circuit approved the admissibility of such evidence under authority of its prior decisions in *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert. den. 368 U. S. 875; *Flame Coal Co. v. UMWA*, 6 Cir., 303 F. 2d 39, cert. den. 371 U. S. 891; and *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U.S. 881.

c. The issue concerning instructions refused, the jury charge, and the submission of Interrogatory 1 to the jury.

Because Companies asserted jurisdiction under the Act's Section 303, and the Sixth Circuit has held UMW engaged in secondary boycott picketing, it becomes pertinent that the district court refused UMW's Instruction 3, containing the elements essential to a violation of that section (333-34a), and by which the jury would have been instructed on the difference between a primary employer and a "neutral" employer. Nowhere in the court's charge is this distinction noted (A. 23-34a). Instead, the jury was told that (338a) plaintiffs claimed UMW induced and encouraged *employees of producers* engaged in hauling or supplying coal to the tipple to refuse to do so, *with the object of forcing these plaintiffs to join the union*. UMW objected to the trial court's refusal to give Instruction 3 (348a).[a] So, too, when the trial court submitted its interrogatories to the jury for answer, UMW noted objections to Interrogatory No. 1 because "it does

[a] In stating its objections to the jury charge, UMW counsel stated:

"The Court erred in refusing to give the Instructions as tendered by the defendant in its Instructions Nos. 1 and 2.

"The Court erred in its Instruction with reference to the secondary boycott provision, as sued upon in the complaint, in that the Court did not define boycott in the terms of the Statute, that is, Section 303 of the Labor-Management Relations Act of 1947; and the Court erred in refusing to give Instruction No. 3 with reference to the boycott as tendered by the defendant."

not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs" (15-17a), 337a, 349a). Like the court's charge (338a), the interrogatory posed the inquiry whether UMW's purpose was to force or require *"Plaintiffs to join the Union"*.[b]

Likewise, UMW complained to the Sixth Circuit of the trial court's refusal to give its proffered Instruction 4 dealing with primary picketing, as well as proffered Instruction 5 which would have told the jury, under the holding of *NLRB v. Int. Rice Milling Co.*, 341 U.S. 665, 672, that violence, if any, is not material in a Section 303 violation. UMW's objection to such refusal is recorded (349a).

The Sixth Circuit, regarding the charge to be "without prejudicial error" (A. 5a), declared it unnecessary to pass "upon that question" or "to consider the propriety of the trial court's rulings on Interrogatory 1 and its refusal to give certain instructions requested by defendant because UMW had not met the requirements of Rule 51, Federal Rules of Civil Procedure, which, the appellate court notes provides for "stating the matter to which he objects *and the grounds of his objection*" (A. 5a).[c]

d. The issue of damages.

In both lower courts, UMW asserted the lack of evidence to support the jury's award of damages both to Sunfire for $250,000 and to Ashlo for $14,000.

UMW pointed out that Ashlo employees continued to work (*ante*, p. 9); truckers delivered all the coal that each of them had for delivery to the tipple (*ante*, p. 16-17); and the evidence did not warrant a jury verdict of UMW responsibility for the tipple's burning (*ante*, p. 10-15).

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[b]The interrogatories and answers thereto are found in the Supplemental Appendix filed by UMW in the Sixth Circuit (p. 367a).

[c]Emphasis is that of the Sixth Circuit.

Though the Sixth Circuit agreed, "The record discloses no positive evidence of the origin or of the originators of the fire" (A. 3a) it declared "there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant" (A. 3a).

The Sixth Circuit's opinion does not deal specifically with the damages issue, except as indicated above. However, it does recite that it suffices "to say that no justification appears for disturbing the judgment of the trial court or its order denying defendant's motion for a new trial on numerous grounds, including this one" (A. 4a).

e. The issue whether Sunfire Coal Company is a person who may maintain an action under Section 303.

In its answer (7a), UMW asserted that Sunfire "is not such a person as may maintain an action against" UMW. The evidence showed Ashlo had no sales force (56a) to sell coal purchased and processed by it, but that Sunfire "helped in the sales of the coal" (22a) for Sunfire's profit (56a). Sunfire's Vice President Davis related that Sunfire "made a material effort in the sale of coal" (40a). In Sunfire's lease to Ashlo it was provided that Sunfire was to receive a monthly per-ton rental "for all coal processed and *sold*" (49a). The Sixth Circuit rejected UMW's contention that the trial court was without jurisdiction, power and authority over Sunfire's claim, saying, "This argument is completely untenable" (A. 5a) and that Sunfire's situation "was not comparable to *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, upon which UMW relied.

f. The issue of jurisdiction of the non-federal cause of action.

The complaint predicated the district court's jurisdiction under the Act's Section 303. UMW's answer (7-8a)

asserts "there is no basis for jurisdiction to adjudicate any non-federal cause of action" (8a). The district court, under authority of *UMWA v. Meadow Creek Coal Company, Inc.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, rejected the dismissal motion. In the Sixth Circuit, UMW contended that the district court was without jurisdiction, authority and power to hear matters based upon the non-federal common law claim under the doctrine of pendent or ancillary jurisdiction for reasons discussed *post*, pp —. While the Sixth Circuit's opinion does not deal specifically with this issue, it asserts that "The remainder of the defendant's contentions . . . do not here require discussion", affirming the district court's judgment (A. 5a).

REASONS FOR GRANTING THE WRIT

I.

a. The Sixth Circuit's decision and rationale herein that picketing at the Ashlo tipple constituted a secondary boycott banned by Section 303 squarely conflicts with principles and criteria enunciated by this Court's *Local 761, Int. Union of Elec. Workers v. NLRB*, 366 U. S. 667, as essential to a finding that a statutory secondary boycott was committed.

Local 761's holding is that where there is but one entrance to the plant of an employer engaged in a labor dispute with a union, and that entrance is used alike by employees of that employer and employees of another employer, "such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees" and is "outside the bar of 8(b)(4)(A)" (366 U. S. 682); and since picketing at Ashlo's tipple occurred at the only entrance provided a. ication of *Local 761's* doctrine shows unequivocally the conflict of

the Sixth Circuit's conclusion herein with that of *Local 761*.

Furthermore, in *Local 761*, this Court emphasized that "The key to the problem . . . is found in the type of work" being done by those passing through the entrance where picketing occurs (p. 680), and if such entrance is "in fact used by employees of independent contractors" and the work performed is "necessary to the normal operations" of the primary employer, such picketing is not conduct interdicted by Section 303 (p. 682). Where, as herein, coal hauled to the Ashlo tipple was brought there to be processed and readied for market, it was, as stated in *Local 761*, "necessary to the normal operations" of Ashlo and Sunfire.

b. Recently this Court granted certiorari in *United Steelworkers of America* v. *NLRB*, U. S. , 10 L. ed. 2d 410, Case No. 925, wherein the National Labor Relations Board implemented the *Local 761* doctrine in a situation where a union struck the Carrier Corporation after a break-down in negotiations and established picket lines at plant entrances and at an adjacent gate on a railroad right-of-way where, by mass picketing, pickets attempted to block the train's passage, and threats were hurled at the train's operating personnel. NLRB (one member dissenting) rejected the contention this conduct offended the Act's secondary boycott section, applied *Local 761's* criteria, and held because delivery of empty boxcars to Carrier and the transportation of Carrier products "clearly were related to Carrier's normal operations", the Act's secondary boycott provisions were not violated. *Local Union No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB 127, 130. The Second Circuit reversed (*Carrier Corp.* v. *NLRB*, 2 Cir., 311 F. 2d 135, with Chief Judge Lumbard dissenting because the

majority view was discordant with *Local 761* criteria; and three Circuit Judges opposed the Second Circuit's *en banc* rehearing denial. This Court granted certiorari therein; the case is currently pending; and this Court's decision therein would have a direct bearing upon the instant case, not alone as to the producers and truckers, but also as to the incidents relating to L&N's train crews (*ante*, p. 18-20), which UMW claimed did not ground a Section 303 violation and to which claim the Sixth Circuit did not respond. Nor did the Sixth Circuit respond to UMW's contention that railway employees do not fall within the Act's scope. See *ante*, p. 19 and footnote 15.

c. Notably, the Sixth Circuit's opinion makes no mention of *Local 761*, although UMW vigorously pressed upon that Court that *Local 761* condemned the money judgments against UMW and, in a rehearing petition,[32] asked it to explain if or why the Court believed *Local 761* to be inapplicable. Thus, it is evident that the Sixth Circuit deliberately refused, and will continue to refuse, to follow *Local 761*.

Though UMW complained of the Sixth Circuit's failure to adopt such criteria heretofore,[33] the Court has said that there is an absence of precedential value in the denial of certiorari and denial is not designed to reflect the Court's views as to the case's merits. *Parker* v. *Ellis*, 362 U. S. 574; *Polites* v. *U. S.*, 364 U. S. 426, 433, fn. 9. Moreover, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, this Court granted certiorari to reexamine a case in light of previous decisions. UMW borrows from a case in light of previous decisions, presenting important questions under federal statutes. UMW borrows from and approves the Petition for Certiorari statement (p. 22) in *United Steelworkers* (10 L. ed. 2d 410) that the

[32] See Petition for Rehearing, pp. 5-6.

[33] *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, cert. denied, 371 U. S. 891, with Mr. Justice Douglas voting to grant; *Gilchrist* v. *UMWA*, 6 Cir., 290 F. 2d 36, cert. denied, 368 U. S. 875.

"law which imposes such heavy financial liability on unions ought at least to make clear what their obligations are."

d. In addition, the Sixth Circuit's reasoning in holding picketing activities at Ashlo's tipple to be a proscribed secondary boycott is directly opposed to this Court's requirement of a "neutral" employer in order that there be a boycott under the statute. *Local 1976, Carpenters* v. *NLRB*, 357 U. S. 93, 100, holding that a *sine qua non* of a boycott under the statute is the existence of a "neutral employer".

The Sixth Circuit agreed that "To the extent that such producers had not signed agreements with it, defendant was essentially engaged in negotiation or conflict with them" (A. 3a). Inherent therein is the admission that each of such producers was *a primary employer* having a primary dispute with the union. *Likewise*, since *Ashlo and Sunfire* refused to sign the UMW agreement, *each* of them, like the producers, *was a primary employer with a primary dispute with the union*. Hence, when the Sixth Circuit reasoned that "Faced with the complexity of numerous picketings at separated and inaccessible mine locations, defendant chose the simpler course of closing the outlet provided for the numerous producers by Ashlo's operation of Sunfire's tipple" (A. 3a), the Sixth Circuit ignores the fact that all employers involved were *primary*, and that "Congress did not seek" by the boycott provisions "to interfere with the ordinary strike". *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 672.

The Sixth Circuit's opinion evades explanation of who constitutes the "neutral" or who is the employer who may be characterized as the one "not concerned with a primary labor dispute" essential to a statutory boycott. *Local 1976, Carpenters* v. *NLRB*, 357 U. S. 93, 100. If the court below sought to cast Ashlo and Sunfire in the role

of "neutrals" by rejecting UMW's contention that "Ashlo employees were themselves picketing for higher wages" (A. 3-4a), a ready answer is found in the uncontradicted evidence that at least 5 of Ashlo's 8 or 10 employees were among the strikers, picketing for higher wages they sought to achieve through their employer's executing the UMW agreement (64a, 78a, 180a, 187a, 288a).

While the opinion acknowledges the union sought contracts from 176 nonsignatory producers, the Sixth Circuit further rationalized that the union's "strategy in attempting to obtain contracts with the 176 producers by concentrating efforts on the smaller number of outlet-operators is further indicated by defendant's attempt to obtain contracts with the latter which would permit them to purchase coal only from producers under contract with defendant" (A. 4a); but such reasoning is fallacious since it ignores that *each of the 176 producers was, like Ashlo and Sunfire, a primary employer.*

Furthermore, the Act's legislative history shows Senator Taft's declaration that the secondary boycott provisions "makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly *unconcerned in the disagreement between an employer and his employees*";[22] *but since there is no evidence that Ashlo or Sunfire did business with the 176 producers,*[23] *the object of picketing at Ashlo's tipple or at any other point could not have been to cause them to cease doing business with them.* Hence, as to such producers, picketing at the tipple or elsewhere had no relevancy and could not properly serve as a basis for holding UMW violated Section 303 as to Ashlo or Sunfire.

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[22]93 Cong. Rec. 8709, noted in *Truck Drivers, etc. v. Empire State Express, Inc.*, 5 Cir., 293 F. 2d 414, 422.

[23]With the exception of those concerned with producing and hauling coal purchased by Ashlo and as to whom it has already been shown no condemned picketing under Section 303 was involved.

II

The Sixth Circuit's approval of the money judgments against UMW herein sanctions a jury verdict of union responsibility an dliability for the acts of union members' without regard to the existence of an agency relationship between the members an dthe labor union, and is directly opposed to the standard of union responsibility heretofore enunciated by decisions of this Court and other federal courts, by congressional intent as reflected in the Act's legislative history, and by the National Labor Relations Board in implementing that intention.

Ever since the *Coronado* cases[24] federal courts have regarded labor unions as entities distinct from union membership. In the first of those cases (259 U. S. 395), proof of "actual agency" was declared a prerequisite to union responsibility. Later, in defining the Act's term "agent", Congress, as the Act's legislative history shows, intended to adopt the common law rules of agency. As its chief proponent, Senator Taft declared *"The fact that a man was a member of a labor union . . . would be no evidence whatever to show that he was an agent."*[25] In *Sunset Line and Twine Co.*, 79 NLRB 1487, 1508, Board stated: "Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal" and the "burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority". Accord: *NLRB* v. *Gottlieb & Co.*, 7 Cir., 208 F. 2d 682, 684; *NLRB* v. *Miami Coca-Cola Bottling Co.*, 5 Cir., 222 F. 2d 341. In *Sunset*, Board professed that the Act is not directed toward individual em-

[24] *UMWA* v. *Coronado Coal Co.*, 259 U. S. 344, 387, 391; *Coronado Coal Co.* v. *UMWA*, 268 U. S. 295, 304-5.

[25] See, Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 1204-5. Also see Appendix C hereto, p. 16a.

ployee conduct, and it "has a clear statutory mandate to apply the 'ordinary law of agency' " (p. 1507) and that *union members are not per se union agents* (p. 1508, fn. 41). In *Poinsett Lumber and Mfg. Co.*, 33 LRRM 1101, Board said, ". . . . it is well established that mere advocacy of the [union] by rank-and-file employees does not constitute them agents of the" union. In *International Ladies Garment Workers Union* v. *NLRB*, 99 App. D. C. 64, 70, 237 F. 2d 545, 551, the Court held that "imputation of the acts of one person to another" is forbidden "except when the one is acting as agent for the other". Accord: *NLRB* v. *Ohio Calcium Co.*, 6 Cir., 133 F. 2d 721. The Fifth Circuit, in *NLRB* v. *Marshall-Car Wheel etc., Inc.*, 5 Cir., 218 F. 2d 409, 417, rejected a contention that there was an agency relationship "between all strikers, the guilty employees, and the union".

Though UMW argued the requirement of agency proof, as well as the record's lack thereof, the Sixth Circuit's opinion contains no response to UMW's contention, and UMW submits this omission is significant in its challenge herein to the Sixth Circuit's approval of the district court's judgment.

To approve the jury verdict herein the Sixth Circuit had to ignore that such verdict resulted from the district court's permitting the jury to predicate UMW's responsibility and liability upon union members' conduct,[24] and the error thus committed was both accentuated and emphasized by the trial court's jury charge that "officers of the union and . . . of the district and the *members of the union and the* members of the district are largely identical as far as rights and powers and duties are concerned, *and as far as representation of the union is concerned*"

[24]The Interrogatories posed to the jury the question its belief that UMW "through its officers, agents, representatives or members committed wrongful acts (367-69a)

(340a), as well as by the trial court's refusal (A. 19a) to give UMW's proffered Instruction No. 2 (to which refusal UMW noted its objections, A. 34a) which would have told the jury that union members are not *per se* union agents and that liability depended upon clear proof that persons committing wrongful acts acted as UMW agents while acting within the scope of their employment or authority" (A. 19a). Yet, the Sixth Circuit deemed the jury charge "without prejudicial error" (A. 5a.)

Though UMW stressed that even if Morris were guilty of the tipple's burning (and even the Sixth Circuit admitted the lack of positive proof thereof), there was no evidence that Morris was UMW's agent as to justify imputing that conduct to it; and the Sixth Circuit did not refute UMW's agency contention.

Similarly, the Sixth Circuit stamped as properly admitted the testimony of two employees of doctors showing that medical bills for treatment to James Morris, a union member, had been paid by the UMW Welfare & Retirement Fund (A. 5a). Unless the testimony's purpose was to show an agency relationship with UMW, it could have had no relevancy. Though agreeing the Fund was a "separate organization" from UMW, and despite the district court's having *equated UMW agency with UMW membership* in stating before the jury, "You can show that Mr. Morris . . . was not a member of the union or had no rights in the union (84a)", the Sixth Circuit, *likewise equating agency with union membership*, approved the admission because "evidence that the [Fund] had paid medical bills . . . was properly received *on the issue of his relationship with UMW* (A. 5a). A vice of such reasoning is that evidence showed no more than Morris was an employee of a signatory operator to the UMW contract; it did not show

even union membership since membership is not the criterion of eligibility to participate in the Fund. *Gambrell* v. *Lewis*, 167 A. 2d 605 (Mun. Ct. of App. D. C., 1961).

The Sixth Circuit's obvious unconcern with the agency factor is further demonstrated by the incident where, over UMW objections, the district court admitted a trooper's statement concerning stopping a car, in an area other than at the Ashlo tipple, in which Morris and another person rode on May 14, after picketing had stopped and the Ashlo tipple burned, and found ammunition and a gun in the car, but neither arrested nor charged either (80-1a). To UMW's complaint that there was no showing of an agency relationship between UMW and either of the persons, the Sixth Circuit responded, "the jury had a right to consider this evidence in determining whether there was a concert of action *between the two individuals*" (A. 5a).

As the record shows, these errors have resulted in judgments against UMW in favor of Sunfire for $250,000.00 and in favor of Ashlo for $14,000.00. Thus, responsibility and liability having been permitted upon an erroneous theory, and the jury verdict being a general one,[2] reversal by the Sixth Circuit was required by this Court's *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29, holding, "Since we hold erroneous one theory of liability upon which the general verdict may have rested, it is unnecessary to explore the legality of

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[2] "The interrogatory submitted to the jury posed 3 questions, both answered in the affirmative (1) whether UMW, through officers, agents, representatives or members, to force or require "Plaintiffs to join the Union", induced or encouraged employees of producing companies, engaged in hauling or supplying coal to plaintiffs' tipple, to refuse concertedly to transfer coal from the mines to the tipple, or (2) for the same object, by force or violence, induced plaintiffs' employees concertedly to refuse to work for plaintiffs; and (3) was the result of such conduct by the Defendant, its officers, agents, representatives and *members*", did plaintiffs sustain damage to their business or property?

the other theories" and approving the rule that "If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ." as found in Maryland use of *Markley v. Baldwin*, 112 U. S. 490, 493.

III.

Further emphasizing the Sixth Circuit's lack of concern for the necessity of proving union agency relates to its approval of the district court's permitting various coal operators (*ante*, p. 25) to testify concerning their having suffered property damages but without proof or identification of the tortfeasors.[28] The seriousness of this error lies in the formulation of a procedural pattern for imposing money judgments upon labor unions by permitting employer plaintiffs full freedom from their heretofore recognized burden of proving that a union, through its agents, committed acts condemned by Section 303. The pattern now creates a *'presumption of union responsibility"* if the illegal acts occur at a time and place where a union may be involved. It permits the concept of piling one guess or inference upon another, condemned in *U. S. v. Ross*, 92 U. S. 281, 283, where it is said: "They are inferences from inferences, presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible." Accord: *Wesson v. U. S.*, 8 Cir., 172 F. 2d 931; *NLRB* v. *Ray-Smith Transfer Co.*, 5 Cir., 193 F. 2d 142, 144.

The procedural pattern consists of four steps: *First Step:* The primary employer (plaintiffs herein) testify, to property damages during a strike period, and as herein,

[28]Without comment, the Sixth Circuit rejected UMW's contention that the evidence was improperly admitted except it pointed to its prior decisions in *Gilchrist*, *Flame*, and *Osborne* (*ante*, p. 26). However, the opinions therein do not deal with the type of proof under discussion.

without proof of the party or parties responsible therefor. *Second Step:* The primary employer (plaintiffs herein) introduce as witnesses other employers whose operations have been picketed, they too are permitted to relate that their property has been damaged; and they too are not required to identify the tortfeasors. In some instances, as herein, they admit they do not know who committed the acts (125a, 139a, 140a, 141a). *Third Step:* The trial court charges the jury, as in the instant case, that while such evidence "does not constitute direct proof", nevertheless "They may be considered as bearing upon whether or not there was a common plan in regard to the operations of this strike and the operation of the pickets" (348a). *Fourth Step:* The district court then charges the jury that union responsibility is not restricted to union agency but may be based upon conduct of union members—even though there has been no evidence of who committed the acts.

Long before the Wagner Act, this Court declared "The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees" (*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209), and in the Act's Section 13, Congress guarantees the right to strike except as the Act restricts that right. Yet, where, as in the instant case, the Sixth Circuit has approved the pattern by which union responsibility is imposed by permitting witnesses to testify of tortious conduct without identifying the actors and there is no evidence that the tortfeasors acted at the direction of identified agents, such pattern effectively destroys labor's right to strike, frustrates national labor policy as enunciated by Congress and poignantly proclaims that strike activity is at labor's economic peril.

The pattern herein may not be treated as isolated to the instant case. If permitted to stand, it serves as a standard of sufficient proof and proper procedure when-

ever a labor union finds itself a defendant in a labor dispute action. It is crucial even to UMW in other litigation now pending in the Sixth Circuit,[29] and it is involved too in another Sixth Circuit case in which the petition for certiorari is now being prepared.[30]

In non-labor cases the Sixth Circuit has denied the jury the right to guess (*Troutman v. Mutual Life Ins. Co. of N. Y.*, 6 Cir., 125 F. 2d 769; *Gulf Refining Co. v. Mark C. Walker & Son Co.*, 6 Cir., 124 F. 2d 420, 425.) Its sanction herein is directly opposed by federal appellate courts in labor cases which deny to the National Labor Relations Board the right "of raising suspicion to the status fact or of basing inferences upon mere speculation". *NLRB v. Sun Shipbuilding etc. Co.*, 3 Cir., 135 F. 2d 15, 31; *Hazel Atlas Glass Co. v. NLRB*, 4 Cir., 127 F. 2d 109; *NLRB v. Goodyear Tire & Rubber Co.*, 5 Cir., 129 F. 2d 661, 664.

The preceding discussions have demonstrated the total lack of evidence to support the opinion's conclusion that the picketing was a secondary boycott violative of the Act's Section 303 and UMW responsibility and warrant for the jury awards either under Section 303 or the common-law claim. Heretofore, this Court has rejected jury verdicts which had the imprimatur of lower appellate courts when the records were so devoid of evidentiary support as to render them unconstitutional *under the due process clause*. *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157, 163. While these cases dealt with the deprivation of liberty, the Federal Constitution's Fifth Amendment likewise forbids the deprivation of "*property, without due process of law*".[30a] In the instant case, where the record is devoid of any evidence

[29] *R. P. Price et al., dba Elkhorn Coal Co. v. UMWA*, Case No. 15,046

[30] *White Oak Coal Co. v. UMWA*, 6 Cir., 318 F. 2d 591.

[30a] The Federal Constitution's Fifth Amendment reads in part that: "No person shall . . . be deprived of life, liberty or property, without due process of law, . . ."

to support the jury finding of UMW responsibility and the jury awards against UMW, the sanction thereof by the Sixth Circuit's opinion and judgment that Companies recover of UMW the money judgments aggregating $264,000 clearly deprives UMW of property without due process of law.

IV.

Local 761 highlights the difficulty which federal courts and the Board alike have had in interpreting Section 303, despite their expertise. There is no reason to think a jury of laymen would be less perplexed as to what is required to sustain a Section 303 violation. This emphasizes the vital necessity that a jury charge be given with clarity and precision and, particularly, should include those criteria which would afford a jury in an interrogatory submitted to it to determine the factual issues submitted. Neither the court's instructions nor the interrogatories did so.

In addition to the gross error contained in Interrogatory I which permitted the jury to find UMW responsible and to fix money damages against it for *members'* conduct without concern of union agency (discussed in Reasons II and III), in the Sixth Circuit, UMW complained the Court's Interrogatory 1 (upon which other interrogatories were based) was inconsistent with pleadings and without evidentiary basis; that it did not clearly apprise the jury of the law to be applied to the facts; that the trial court had committed reversible error in its charge concerning the elements of a Section 303 violation, an error which would have been eliminated had the court charged the jury according to UMW's proffered Instruction 3; and that the trial court had committed reversible error in refusing UMW's proffered Instructions 4 and 5.

The district court submitted for jury answer, Interroga-

tories 1 through 6 (367a).[1] UMW objections to Interrogatory No. 1 (upon which the other interrogatories were based) stated "*it does not correctly state the law concerning the violation of* the Statute or the evidence offered by the plaintiffs" (15a-16a, 337a, 349a).

First, we discuss the lack of evidence to support the Interrogatory, which posed the inquiry whether UMW's purpose in the activities at Companies' premises was to force or require "*Plaintiffs to join the Union.*" Since the jury gave an affirmative response, it is important to note this purpose, as posed in the interrogatory and so answered by the jury, *is wholly inconsistent with the complaint's allegations.*[2] Moreover, not a word in the record supports the Interrogatory's inquiry that UMW's purpose was to force or require either Ashlo or Sunfire's joining UMW.

It is well-settled an instruction on a proposition of law about which there is no evidence is clearly erroneous. *Evansville Container Corp. v. McDonald*, 6 Cir., 132 F. 2d 80, 85. Certainly the same result obtains where, as here, a jury has answered an interrogatory not supported by facts and judgment is entered upon the jury's response.

Secondly, since Companies claimed federal jurisdiction was based upon a violation of the Act's Section 303, UMW sought to have the jury instructed by its Instruction 3 (333a) that a violation thereof required a labor dispute

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[1] These Interrogatories are to be found in UMW's certified Supplemental Appendix record filed in this Court (367a).

[2] In the complaint's paragraphs 4 and 5, Companies alleged the objects to be:
"4. . . the objects of the union were to force plaintiffs to cease doing business with other employers, and to force such other employers to recognize or bargain with the Union as the representative of the employees of such other employers. . ." (4a); and
"5. . . the objects of the Union were to force and compel other employers and persons to cease doing business with plaintiffs, and to compel plaintiffs to recognize or bargain with the Union as the representative of plaintiffs' employees. . ." (5a).

between a primary employer and the union which, to win the dispute, pressured employees of a "*neutral employer* with whom it had no dispute" to refuse to handle the primary employer's products, and, the union's object must have been to force Companies to recognize or bargain with it as representatives of plaintiffs' employees or to force other coal producers and persons to quit doing business with Companies. This was consistent with this Court's *Local 1976*. Yet, the jury instructions are silent concerning the important factor of the *neutral employer*.

While the trial court instructed the jury the law recognized the right to strike and picket peacefully, in submitting Interrogatory 1 posing the question whether UMW induced or encouraged employees of coal-producing companies engaged in hauling or supplying coal to Companies' tipple to engage in a concerted refusal to transfer coal from their employers' mines to that tipple (339-40a), it failed to instruct either in the Interrogatory or in its instructions, as *Local 761* observes, that Section 303 "could not be literally construed" because to do so would ban primary activity (366 U. S. 672). Nor did the district court apprise the jury, as *Local 761* proclaimed, "*mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees*" (366 U. S. 682) or that to find a Section 303 violation. (366 U. S. 680). "*The key to the problem is found in the type of work that is being performed by those who use the separate gate*" and that " '*the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations*' " (366 U. S. 681).

UM's Instruction 4, refused (A. 21a), dealt with the right of primary picketing. One looks in vain to find in

the court's instructions any attempt to distinguish between primary and secondary activities—a critical omission! *Local 761* cautioned that the line between primary activity is not a "glaringly bright" one; and in demonstrating a Section 303 violation occurs only when the objective falls within one specifically banned thereby, this Court noted, "*The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade*" (366 U. S. 673), and "*picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object" in violation of Section 303* (366 U. S. 673). This Court emphasized the need for distinguishing between objects of picketing activity which falls within the ambit of conduct proscribed by that Section and those which do not. *This is precisely what the district court did not do!*

Moreover, *International Rice Milling Co.*, 341 U. S. 665, 672, holds violence is immaterial in a Section 303 charge, and UMW's Instruction 5 (335a) would have so advised the jury; but in addition to rejecting it (336a), the court's instructions emphasized the element of violence (A. 23-34a).

Interrogatory 1 is to be condemned, too, because it submitted to the jury a mixed question of law and fact. *Carpenter v. Baltimore & Ohio R. Co.*, 6 Cir., 109 F. 2d 375, 379; *Feldmann v. Conn. Mut. Life Insurance Co. of Hartford, Conn.*, 8 Cir., 142 F. 2d 628, 634; *Jackson v. King*, 5 Cir., 223 F. 2d 714, 718. Where, as here, the question is a mixed one of fact and law, and the district court failed to instruct the jury as to the legal standards properly to be applied, the interrogatory is offensive not only to the foregoing principle, but also to Rule 49's (Federal Rules) [A. 18a] requirement that the court shall give "such explanation or instruction" as may be needed to enable the jury competently to answer the interrogatories.

The Sixth Circuit does not deny UMW's contention that Interrogatory 1 submitted to the jury was wholly inconsistent with the allegations and was not supported by the facts. It incorrectly asserts (A. 5a) UMW did not state its grounds of objections to the Interrogatory. Objection was made it did not "correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs" (15a-16a, 337a, 349a). The opinion's indication that F. R. C. P., Rule 51's requirement is inflexible must be compared with *City of Knoxville v. Bailey*, 6 Cir., 222 F. 2d 520, 529, where exceptions to the trial court's refusal to give special requests sufficed to meet the Rule's requirements, and to *Solomon v. U. S.*, 6 Cir., 276 F. 2d 669, 674, where review was accorded although no objection was raised until the motion for a new trial. The opinion does not respond to UMW's contention that a jury answer to an interrogatory not supported by fact is erroneous.

Moore's Federal Practice—Rules and Official Forms, as Amended 1963, p. 925 recites: "Hence although no timely or proper objection was made, the court's error in instructing on a material issue may be the basis for grant of a new trial by the district court when it is apparent that a miscarriage of justice may otherwise occur."

Further, just as the opinion disregarded *Local 761's* principles in holding UMW violated Section 303, so the trial court ignores those principles and this Court's professions therein which would have guided the jury in its determinations. Yet, despite UMW complaint that the trial court's instructions lacked these essentials, and failed to denote the necessity that there be a neutral employer (which Instruction 3, refused, would have done) and to distinguish between primary and secondary picketing (encompassed in UMW's proffered Instruction 4, A. 21a), and

to apprise the jury that violence is immaterial in a Section 303 charge (which was encompassed in its proffered Instruction 5, refused), the opinion merely recites the trial court's charge to be "without prejudicial error" (A. 5a). The opinion does not refute UMW's contention the essentials of a Section 303 violation were not given to the jury; and *Thomas v. Union Ry. Co.*, 6 Cir., 216 F. 2d 18, proclaims that an erroneous instruction is presumptively prejudicial.

The Sixth Circuit erroneously states (A. 5a) no objections were made to the jury charge. In addition to objecting that the charge did not define the boycott in terms of the statute, UMW objected to the trial court's refusal to give its proffered Instructions (333- 36a, 337a, 348-9a). *Hasselbrink v. Speelman*, 6 Cir., 246 F. 2d 34, 39, made clear that where a point was called to the trial judge's attention so as to advise him as to the question of law involved, that sufficed against a contention that objections were not formally made. "A formal objection need not include detail of supporting argument in order to fully apprise the court of the grounds of the objection." *Darter v. Greiner*, 10 Cir., 301 F. 2d 772, 775. The Sixth Circuit relied upon *Palmer v. Hoffman*, 318 U. S. 109, 119 (A. 5a) but this Court's requirement therein that "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error" (318 U. S. 119), UMW submits, is met by UMW's proffered instructions and its noted objections. This is consonant with this Court's declaration in *Sunkist Growers, Inc.* (370 U. S. 19, 26-7) that instructions and objections "must be viewed in context" and, noting that counsel had requested certain instructions, as herein, rejected the contention that objections to instructions had been waived.

In contrast to the opinion's disregard of UMW's con-

tentions and its failure to show any fallacy in UMW's argument on the interrogatory and the instructions (given and refused), is the Sixth Circuit's evidenced concern where the jury was incorrectly charged on material issues in *Bellak v. United Home Life Ins. Co.*, 6 Cir., 244 F. 2d 623; *Southern Ry. Co. v. Elliott*, 6 Cir., 250 F. 2d 740.

The foregoing discussion abundantly demonstrates the Sixth Circuit's error, as well as the need for guidance by this Court in jury trials concerning Section 303 violations.

Since the jury's answer to Interrogatory 1 encompassed both the alleged Section 303 violation and the common-law claim, the errors discussed in each of Reasons I through IV condemn the jury's verdict of UMW's responsibility and the money awards and the judgments based thereon.

V.

As noted (*ante*, p. 28), UMW challenged the district court's jurisdiction, power and authority to hear Sunfire's claim and to enter judgment in its favor, as they related both to Section 303 and Kentucky's common law. In the Sixth Circuit's *Osborne Mining Co.* case (279 F. 2d 716), that court, noting Love and Amos was a sales agency and Osborne's agent, and sold coal mined by Osborne, for which it was paid a commission, declared jurisdiction was lacking because Love and Amos "failed in their federal cause of action", not because of "lack of supporting evidence" but "because it never had and could not assert any federally recognized cause of action or ground of recovery" (279 F. 2d 729). There being no federal cause, the Sixth Circuit declared the district court, in *Osborne*, had no jurisdiction for violation of the Tennessee common law and ordered dismissal of Love and Amos' complaint. The Sixth Circuit herein distinguished the instant case from *Osborne* on the ground that "no such agency relationship is disclosed by the record" (A. 5a). That it erred in so holding is manifest from the undisputed evidence

(*ante*, p. 28) showing the agency relationship between Sunfire and Ashlo.

VI.

In the Sixth Circuit and the district court, UMW asserted there was no basis for jurisdiction to adjudicate any non-federal cause of action. While the Sixth Circuit's opinion does not discuss the jurisdictional question, discussed below, which was raised in the Sixth Circuit, it recites that "the remainder of the defendant's contentions, all of which have been resolved adversely to it, do not here require discussion, and it follows that the district court is affirmed" (A. 5a).

There is thus presented a federal question important in the construction and administration of the Act's Section 303, in that herein the Sixth Circuit has sanctioned a federal district court's assumption of jurisdiction, power and authority over a state common-law tort claim against an unincorporated labor union, even though diversity of citizenship of parties is lacking and even though the district court is sitting in a state in which the claim allegedly arose and which does not regard the unincorporated labor union as a jural entity and would not have permitted such an association to be sued in its state courts in its common name on such common-law tort claim.

Guaranty Trust Co. v. York, 326 U.S. 99, declared that "a federal court adjudicating a State-created right . . . is for that purpose, in effect, only another court of the State" and that "*it cannot afford recovery if the right to recover is made unavailable by the State*" (326 U. S. 108-9). Therein, this Court admonished that, "the accident of a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result" (326 U. S. 109). The Sixth Circuit's result herein is in direct conflict with this Court's foregoing professions.

a. In rejecting UMW's motion to dismiss the complaint the district court pointed to *UMWA v. Meadow Creek Coal Company, Inc.*, 6 Cir. 263 F. 2d 52, cert. den. 359 U. S. 1013, as its authority for rejecting dismissal. That case placed heavy reliance on *Hurn v. Oursler*, 289 U. S. 238, but such reliance is misplaced, since, as the following discussion shows, *Hurn*, as well as *Meadow Creek*, *UMWA v. Osborne Mining Co., Inc.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881, and *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert den. 368 U. S. 875, are inapplicable.

While *Hurn* permitted a federal court to deal with both a non-federal and a federal claim in the same case, to justify *Hurn's "judicial economy"* doctrine, this Court rationalized the federal and non-federal claims "so precisely rest upon *identical facts* as to be little more than *the equivalent of different epithets to characterize the same group of circumstances*" (289 U. S. 246).

If this be the basis for the district court's conclusion, then assertion of jurisdiction of the non-federal claim finds full challenge in the doctrine of federal preemption, for if the non-federal claim be supported only by evidence reflecting a violation of Section 303, then Congress would have occupied the field of the type of conduct involved in Section 303 and thereby would have foreclosed state court jurisdiction to entertain a common-law tort action for damages based thereon. The result thereof would be the district court had no jurisdiction to entertain a common-law tort claim for damages based upon the type of conduct involved in Section 303, since Congress provided a damage action remedy for conduct proscribed in that section.

In *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, this Court rejected

federal preemption because the Act "sets up no general compensatory procedure" for the activity found wrongful therein; but the "compensatory procedure" for activities herein claimed to be unlawful was provided by Congress in Section 303, and this the Court fully recognized in *Labarnum* when it observed "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts" (347 U. S. 665). Congress was not indifferent to the phase of damages resultant from conduct in violation of the Act's secondary boycott provisions, for, not only has union conduct as this case concerns been made subject to regulation by a federal agency, but there is express Congressional provision for a damage action remedy. In *Sherlock v. Alling*, 93 U. S. 99, 104, the Supreme Court stated that, "Whatever . . . Congress determines, either as to a regulation or the *liability for its infringement is exclusive of state authority.*"[1] Accord: *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173.

Since the doctrine of federal preemption is not discussed in *Meadow Creek, Osborne or Gilchrist*, their inapplicability to the instant case is obvious.

The legislative history of the Act's Section 303 records that as originally proposed and passed in the House of Representatives, federal district courts would have been vested with jurisdiction to try damage actions based upon causes of action involving virtually every type of inter-

[1] See also *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569, where it is stated that, "when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirement than they can annul them."

ference arising in the course of a labor dispute."[20] In enacting Section 303, Congress was "concerned with reshaping labor-management legal relations",[21] but it rejected the extension of federal jurisdiction to the adjudication of labor dispute damage actions except insofar as that section "describes and condemns specific union conduct directed to specific objectives." *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U. S. 93, 99, wherein this Court declared that a "primary employer", such as plaintiffs in the case at bar, "with whom the union is principally at odds, has no absolute assurance that he will be free from the consequences" of union activity "by means other than those proscribed" in Section 303.[22] In enacting Section 303 Congress created a new cause of action."

Thus, the district court's assertion of jurisdiction in the instant case upon an alleged violation of plaintiffs' rights under the common law obtaining in Kentucky achieves "that which Congress refused to enact into law", and, as this Court stated in *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U. S. 355, 364, "cannot be sustained."

b. As already shown, in enacting Section 303 Congress

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[20] "Legislative History of the Labor Management Relations Act, 1947, Vol. I, p. 158, 204. Section 12 of H. R. 3020, as passed House, is copied in the Appendix hereto, p. 11-12a.

[21] International Longshoremen's etc. Union v. Juneau Spruce Corp., 342 U. S. 237, 241-2.

[22] While the Court was dealing in Local 1976 with Section 8(b)(4)(A) of the Act, since the proscriptions contained in Section 8(b)(4) parallel those forming the cause of action in Section 303, the Court's language is apposite in the case at bar. *Int. Bro. of Electrical Workers v. NLRB*, 341 U. S. 694; *United Brick Etc. Workers v. Deena Artware*, 6 Cir., 198 F. 2d 637, cert. den. 344 U. S. 897.

[23] In the debates concerning Section 303, inquiry was directed at Senator Taft as to whether "all the amendment would do, if adopted, would be to create a cause of action for damages . . . in a Federal court", to which Senator Taft replied, "That is correct". Legislative History of the Labor Management Relations Act, 1947, (Government Printing Ofc.), Vol. II, p. 1372.

created a new federal cause of action. Nothing therein contained, either expressly or impliedly, indicates Congress intended to vest federal district courts with jurisdiction to deal with state causes of action in the absence of diversity of citizenship required by Section 1332, Title 28, USCA."

The complaint itself (4a-7a) described UMW as a voluntary unincorporated labor organization, which in Kentucky, is not a jural person subject to suit. *Diamond Block Coal Co. v. UMWA*, 222 S. W. 1079 (Ky.); *Local Union No. 500 v. Wise*, 269 S. W. 2d 721 (Ky. 1954).[*] Hence, in the case at bar, UMW's citizenship must be determined by citizenship of its individual members. *Underwood v. Maloney*, 3 Cir., 256 F. 2d 334; *Lowry v. International Bro., etc.*, 5 Cir., 259 F. 2d 568; *Stein v. American Federation of Musicians*, DC Tenn., 1960, 183 F. Supp. 99; *Textile Workers Union of America v. Cone Mills Corp.*, DC, N. C., 1958, 166 F. Supp. 654, 657. Thus, where, as herein, some UMW members are citizens of Kentucky and Companies are likewise citizens thereof, the Kentucky decisions demonstrate the want of the trial court's jurisdiction as to the non-federal common-law cause of action and over UMW.

The Kentucky rule was employed by the District Court for the Western District of Kentucky in *Sanders v. International Ass'n. of Bridge, etc. Iron Workers*, DC, W.D., Ky., 1954, 120 F. Supp. 390, 392, and *Lyons v. Sanders*, DC, W.D., Ky., 1954, 120 F. Supp. 392, to reject federal court jurisdiction for lack of diversity of citizenship.

A contrary result would not only usurp jurisdiction in

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[*] See Appendix herein, p. 10-11a for 28 USCA 1332

[*] See also *Sweeney v. City of Louisville*, 309 Ky. 465, 218 S. W. 2d 4, where the Kentucky Court rejected an action brought against an association as such

conflict with 28 USCA 1332, which vests authority only where there is diversity of citizenship, but it would be also offensive to Rule 17 (b), Federal Rules of Civil Procedure, which subjects an unincorporated association to federal district court jurisdiction on a non-federal cause of action only if "the law of the state in which the district court is held" permits such an association to be sued.* Petitioner herein sought review by this Court of the same question in, *Flame Coal Co. v. UMWA*, 6 Cir., 303 F. 2d 39, and this Court denied certiorari (371 U. S. 891). Flame's reliance upon Rule 17(b), F.R.P.C., is fallacious since that Rule's language is only "for the purpose of *enforcing* for or against [an unincorporated association] *a substantive right existing under the Constitution or laws of the United States.*

Necessity of the trial court's adherence to Kentucky law is expressed by the Third Circuit in *Underwood v. Maloney, supra*, where it declared that "employment of the methods prescribed" by state rules "*is not permissive but is mandatory and exclusive*". (256 F. 2d 342). Since Kentucky would not have permitted a suit against UMW as an entity based upon a common-law cause of action, a crucial inquiry is how the trial court could have acquired even pendent or ancillary jurisdiction of the non-federal claim when Kentucky itself would not have permitted such suit against UMW. Both *Barlow v. Roche et al.*, D. C. Mun. Ct. of App., 1960, 161 A. 2d 58 [Appeal (Case No. 15,951) denied October 7, 1960, by the United States Court of Appeals for the District of Columbia Circuit] and *Benz v. Compania Naviera Hidalgo*, 9 Cir., 233 F. 2d 62 (1956) recognize the lack of jurisdiction in suits against unions in states adhering to the common-law rule.

In a diversity case, it was held that what a plaintiff

* Rule 17(b), Federal Rules of Civil Procedure, appears in the Appendix to this brief, p. 11a.

could not do directly "could not be done for him indirectly." *McPherson v. Hoffman*, 6 Cir., 275 F. 2d 466, 470. Since Kentucky's policy is not to regard an unincorporated association as a jural being, it is difficult to understand how that which does not legally exist and is legally not *in esse* could be said to commit an act which would serve as a basis for a cause of action or be an existing entity for purposes of a money judgment against it.

Further, as to the non-federal claim, the district court had no jurisdiction over UMW. It is thus clear that the district court erred in its failure to dismiss the action as to the state common-law action.

c. Moreover, the impropriety of employing *Hurn* to sustain the district court's nonfederal claim of jurisdiction is shown by the Reviser's Notes to the Judicial Code, 28 USCA, in connection with Section 1338 thereof. As revised, that section expressly grants jurisdiction of a "claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws", and the Reviser explains that joinder "is intended to avoid 'piecemeal' litigation" and that such revision would enact "as statutory authority" the *Hurn* doctrine.*

Specific reference by the Reviser to the *Hurn* doctrine in its relation to Section 1338, and its absence in the other jurisdictional sections of the Judicial Code, demonstrate clearly that applicability of the *Hurn* doctrine which would permit joinder of a non-federal claim was restricted to Section 1338 cases. Such indicated restriction, coupled with Congressional failure expressly to provide for like joinder in instances arising under Section

* Cited also is *Musher Foundation v. Alba Trading Co.*, 2 Cir., 127 F. 2d 9 (1942). See Reviser's Note 28 USCA 1338, p. 66.

303, fully sustain UMW's assertion that *Hurn* and kindred cases have no applicability to Section 303 claims.[42]

Totally challenging the district court's decision that it had jurisdiction of a state claim, the Fourth Circuit, in *UMWA v. Patton*, 211 F. 2d 742, cert. den. 348 U. S. 824, rejected a contention that in a Section 303 cause of action a federal court was nevertheless warranted in awarding punitive damages for a common-law tort of interference on the theory that *Hurn* permitted the allowance of such damages.[43]

The Sixth Circuit's sanction herein of the district court's unwarranted assumption of jurisdiction invites this Court's review. This precise question has not, but in the public interest, should be determined by this Court.

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[42]Fortifying UMW's position is the following statement from an article "The Proposed Revision of the Federal Judicial Code", 60 Harvard Law Review 424-437, where (at p. 431) it is said:

"In restricting the scope of the provision concerning joinder of non-federal question to patents, copyright, and trademark cases, the proponents of the bill have failed to take advantage of an opportunity to resolve the larger question of such joinder as applied to all types of cases involving original jurisdiction."

[43]In *Patton*, plaintiffs asserted, in their Fourth Circuit brief (p. 34) that "The evidence is such to establish not only secondary boycott as made unlawful by the Taft-Hartley law, but also the common law tort of interference with the contract right. . . . In such a case where the federal question, to-wit: the secondary boycott under the Taft-Hartley Act, is not plainly wanting in substance, the federal court, . . . may nevertheless retain and dispose of the case upon the non-federal ground", citing *Hurn*. This contention appears too in *Patton* as reported in 47 ALR 2d 850, 855.

CONCLUSION.

For the foregoing reasons, Petitioner prays that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 14832

United States Court of Appeals

FOR THE SIXTH CIRCUIT

SUNFIRE COAL COMPANY, a corporation, and ASHLO COAL COMPANY, a corporation,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Kentucky—Jackson Division.

Decided February 16, 1963.

Before: WEICK and O'SULLIVAN, Circuit Judges, and PECK, District Judge.

PECK, District Judge. On April 25, 1959, a coal tipple at Combs, Perry County, Kentucky, owned by one of the plaintiff corporations and operated by the other, burned. Thereafter, plaintiffs instituted this action to recover damages allegedly occasioned by such burning, and after jury trial and verdict judgment was entered in favor of the plaintiff Sunfire Coal Company, the owner and lessor of the premises in question, in the amount of $250,000 against the defendant, and in favor of the Ashlo Coal Company, the lessee and operator, in the sum of $14,000, also against this defendant. From that judgment, and from the trial

court's order denying its motion for a new trial, defendant has perfected this appeal.

The burning of the coal tipple climaxed a period of intense labor unrest which had endured nearly a month and a half. The record discloses that during that time contract negotiations were in progress between District 30, United Mine Workers of America, and at least some of 176 coal operators in the vicinity to whom sixty-day notices terminating a prior agreement had been sent on January 7, 1959; plaintiffs, not having been parties to the prior agreement, did not receive such a notice, which also contained an offer to negotiate a new contract. Picketing at the subject premises (hereinafter referred to as the Ashlo tipple) commenced March 16th and continued until the date of the fire, and the unrest referred to included the operation of a motorcade throughout the area for three days; this motorcade was varyingly described as containing from seventy-five to three hundred cars at different times, and its ostensible purpose was to determine which of the mines in the area were operating. The Kentucky State Police were in constant contact with the situation, arrested one individual for attempting to incite a riot, and in general maintained a vigilant surveillance of the area. Most of the 57 witnesses who testified contributed bits of testimony of tacks strewn on the road, of truck tailgates opened to let coal fall to the highway, of boisterous and unruly conduct, of spasmodic shooting and dynamiting, of bullets shot into a coal truck, of knife-slashed tires, of dirty name calling and personal threats, all combining to create a picture of general disturbance and disquiet throughout the community.

On April 24, 1959, there were a dozen state troopers at Combs and one of them testified that on that day the pickets on the road near the Ashlo tipple "continued to come in, there were so many of them, they were out of hand . . . they were just falling in there in carloads." In the course of the day, an attempt by defendant's representatives to get the coal company to execute a contract was unsuccessful.

Shortly after 6 o'clock a. m. the following day the Ashlo tipple burned. During the night, water tanks on the premises had been drained, and the destruction was extensive. Estimates of the number of pickets at the scene the preceding day ran as high as one thousand, and the disturbance continued throughout the night, the testimony indicating that there was considerable shooting toward the tipple, some of which came from the direction of the pickets. A state trooper who saw the fire start testified that a man ran from the tipple less than fifteen minutes earlier, and tracking by bloodhounds disclosed a place at which one or more persons had been sitting, from which such persons were tracked some miles to a point where they apparently got into an automobile. The record discloses no positive evidence of the origin or of the originators of the fire, but there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant.

The Complaint herein was filed under the provisions of Section 303 of the Labor Management Relations Act of 1947, as amended by Public Law 86-257, 1959, and defendant first contends that no damage to plaintiffs' property and business within the meaning of that Section has been alleged or proven. Since permissive primary picketing at the Ashlo tipple would have been legitimate, it becomes necessary to examine the character of this activity.

The evidence was that neither Sunfire nor Ashlo produced coal, but that the latter bought the coal at the tipple from numerous independent producers who caused it to be brought there by truck. To the extent that such producers had not signed agreements with it, defendant was essentially engaged in negotiation or conflict with them. Faced with the complexity of numerous picketings at separated and inaccessible mine locations, defendant chose the simpler course of closing the outlet provided for the numerous producers by Ashlo's operation of Sunfire's tipple. In reaching this conclusion we specifically reject defendant's contention

that Ashlo employees were themselves picketing for higher wages. The pattern of defendant's strategy in attempting to obtain contracts with the 176 producers by concentrating efforts on the smaller number of outlet operators is further indicated by defendant's attempt to obtain contracts with the latter which would permit them to purchase coal only from producers under contract with defendant. It is our conclusion that under the circumstances here present the picketing at the Ashlo tipple was not merely permissive primary picketing, but was a secondary boycott within the meaning of Section 303 of the Labor Management Relations Act. See *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (6 C. A., 1961), cert. den. 368 U. S. 875, and *Flame Coal Company v. United Mine Workers of America*, 303 F. 2d 39 (6 C. A., 1962), cert. den. 371 U. S. 891.

Defendant has undertaken a detailed review of the evidence in support of its argument that the evidence does not support the jury's verdict as to its responsibility for the burning of the tipple. Without here reviewing the evidence except to the extent that it is above summarized, suffice it to say that no justification appears for disturbing the judgment of the trial court or its order denying defendant's motion for a new trial on numerous grounds, including this one.

The defendant further assigns as reversible error the action of the court in admitting, over its objection, evidence in various categories. Under authority of the two cases above cited and *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716 (6 C. A., 1960), cert. den. 364 U. S. 881, evidence concerning dynamiting at plaintiffs' premises, with respect to incidents at mines and properties other than those of the plaintiffs and with reference to property damage sustained by other coal operators was properly received. The court, similarly, properly overruled an objection to the testimony of a state trooper to the effect that he stopped a car containing two

union members and a large amount of ammunition, since the jury had a right to consider this evidence in determining whether there was a concert of action between the two individuals. Whether or not the defendant and United Mine Workers of America Welfare and Retirement Fund are separate entities, evidence that the latter had paid medical bills charged to an individual was properly received on the issue of his relationship with the defendant.

While we feel that the charge of the trial court to the jury was without prejudicial error, on the present record it is unnecessary to pass upon that question, or to consider the propriety of the trial court's rulings on interrogatory 1 and its refusal to give certain instructions requested by defendant. Rule 51, F. R. Civ. P., precludes a party from assigning as error the giving or failure to give an instruction to the jury unless he has objected thereto before the jury retired to consider its verdict, "stating distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis supplied.) Not having stated such grounds, defendant may not now be heard to complain. *Palmer v. Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483 (1943); *McPherson v. Hoffman*, 275 F. 2d 466 (6 C. A., 1960). In a case where one entity acted merely as sales agent for another, it was held that the principal was without a federally recognized cause of action in *United Mine Workers of America v. Osborne Mining Company*, supra. Defendant relies on that case in arguing that as Ashlo's principal agent Sunfire cannot be awarded judgment. This argument is completely untenable because no such agency relationship is disclosed by the record.

The remainder of the defendant's contentions, all of which have been resolved adversely to it, do not here require discussion, and it follows that the judgment of the district court is affirmed.

APPENDIX B

Filed June 7, 1961

Judgment

In accord with the answers of the Jury to interrogatories submitted by the Court upon the conclusion of the trial of this action,

It is the judgment of the Court that the plaintiff Sunfire Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Two Hundred Fifty Thousand ($250,000) Dollars, and its costs herein, and

It is the further judgment of the Court that the plaintiff, Ashlo Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Fourteen Thousand ($14,000) Dollars, and its costs herein.

This 7th day of June, 1961.

H. CHURCH FORD, *Judge*

Filed June 28, 1961

Order

Pursuant to a previous assignment the motion of the defendant for a judgment, or in the alternative for a new trial, having been brought on for hearing on Friday, June 23, 1961, and the Court having heard the argument of counsel for the parties, and having considered said motions, and being advised

IT IS ORDERED that the defendant's motion for judgment, and its alternative motion for a new trial, both be, and the same are denied.

This 27th day of June, 1961.

H. CHURCH FORD, *Judge*

Filed February 16, 1963

Judgment

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ JOHN W. PECK,
United States District Judge
(Sitting by designation)

Filed June 10, 1963

Order

Upon consideration,

IT IS ORDERED that the petition for rehearing be denied.

Approved for entry:

/s/ JOHN W. PECK,
United States District Judge
(Sitting by designation)

APPENDIX C

Labor Management Relations Act, 1947, Section 2 (2) [29 USCA 152 (2)]:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act . . .

Labor Management Relations Act, 1947, Section 2(3) [29 USCA 152(3)]:

. . . any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include . . . any individual employed by an employer subject to the Railway Labor Act . . .

Labor Management Relations Act, 1947, Section 10(c) [29 USCA 160(c)].

Prevention of unfair labor practices.

(c) . . . the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

Labor Management Relations Act, 1947, Section 13 (29 USCA 163):

Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interefere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Labor Management Relations Act, 1947, Section 303 [29 USCA 187]: *Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages*

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in, the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this

subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

. . .

Labor Management Relations Act, 1947, as Amended September 14, 1959, Section 8(b)(4)(i) [29 USCA 158(b)(4)(i)]:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . ."

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28 USCA 1332 reads, in part, as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

". . . . . ."

Federal Rules of Civil Procedure:
"Rule 17. Parties Plaintiff and Defendant; Capacity

". . . . . .

"(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantial right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

Section 12 of H. R. 3020 as Found in Legislative History of the Labor Management Relations Act, Vol. 1, pp. 204-207:

"SEC. 12. (a) The following activities when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute.

"(2) Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer.

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises;

"(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices;

"(C) any strike or other concerted interference with an employer's operation, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate

any law or any regulation, order, or direction issued pursuant to any law.

"(4) Any conspiracy, collusion, or common arrangements between competing employers to fix or agree to terms or proposed terms of employment of their employees, or to subject such terms or proposed terms of employment to common control or approval, not permitted as to their employees, or as to the representatives of their employees, with respect to the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such employees.

"(b) Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the cost of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall have any application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful.

"(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to the same extent as a person found to have engaged in an unfair labor practice under section 8(b) or 8(c).

"(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court issued hereunder, shall be construed to require

any individual to perform labor or service without his consent."

1957 Annual Report, National Labor Relations Board, p. 98:

"In the view of the majority, section 8(b)(4) is violated only by inducement of strike action by employees, as defined in section 2(3), of an employer as defined in section 2(2). These definitions, according to the majority, are controlling because all section 2 definitions are expressly made to apply generally 'when used in this Act,' without exception. Congress' intent being thus manifest, the majority of the Board held that the use of the phrase 'any *employer*' in section 8(b)(4) could be given no meaning other than 'any employer' within the definition of section 2(2), and could not be taken to express an intent to extend the protection of section 8(b)(4) to employers outside the definition of section 2(2). The majority further pointed out that to interpret 'employees of any employer' as broadly as proposed would result in having the Board regulate labor relations of employers which Congress clearly meant to exclude from the act's operation . . . *the majority concluded that a 'secondary boycott by a railroad union or union of municipal employees does not violate section 8(b)(4)(A) even if such a boycott involves inducement of employees of neutral employers subject to the Act.'*"

Excerpts from Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Vol. II:

Senator Curtis (p. 989):

"These loopholes which permit unions to instigate effective secondary boycotts should be closed, and the effect of the secondary boycott provisions of this bill will be to close them".

Senator McClellan (p. 1193):

"the Taft-Hartley law excludes railway . . . employees. They are not now covered by the law. The amendment would include those employees".

Representative Griffin (p. 1522):

"Since . . . railway labor . . . are not 'employees' within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person.'"

LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (U. S. GOVERNMENT PRINTING OFFICE, 1948).

Page 540:

"The conference agreement contains in the definition section a rule to be applied for the purpose of determining when a person is acting as an 'agent' of another person so as to make such other person responsible for his acts . . . (Reference to Norris-LaGuardia Act). Hence under the conference agreement as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)."

* * * * *

Senator Taft, in response to a question by Senator Pepper, said at page 1026:

"I admit it may be difficult to prove the responsibility of a Union. It is sometimes difficult to prove in the case of an employer. If the wife of a man who is working at a plant receives a lot of telephone messages, very

likely it cannot be proved that they came from the Union. There is no case then. There must be legal proof of agency in the case of Unions as in the case of corporations; but I do not think there is anything in the fact that a Union is an unincorporated association which would bring about a condition in law that the act of every member is necessarily charged to the labor organization. No, I think not."

* * * * *

Page 1204:

"Mr. Ferguson. Is the word 'agent' as used sufficiently broad to cover a fellow employee? Or does it mean an agent of the Labor Union?

"Mr. Smith. I do not know how it would be interpreted, but my judgment is that it would be construed to mean an agent of the labor Union who had been appointed to solicit membership.

"Mr. Ferguson. It would not apply to a fellow employee?

"Mr. Smith. I would not think so at all.

"Mr. Ferguson. I think the Legislative History should make it clear that it is not the intent of the proposers of the amendment that 'agent' should cover every employee.

"Mr. Smith. I think the suggestion is entirely correct. But perhaps the Senator from Ohio would comment on that.

* * * * *

"Mr. Taft. I think the word 'agent' used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the Labor Union, the organization as such. The fact that a man was a member of a Labor Union in my opinion would be no evidence whatever to show that he was an agent.

"Mr. Ferguson. I am glad to have that explanation in the record to make the history of it very clear, particularly as to the word 'agent' as used in the bill."

* * * * *

Page 1537:

"Senator Taft. Under the conference agreement, as under the House Bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the common law rules of agency and the ordinary evidence required to establish such relationship."

On the floor of the Senate, Senator Taft was requested to include in the record certain statements made by the managers on the part of the House in returning the conference report, among them (as reported at page 1617) the following is found in the analysis of the bill, after referring to the definition of "agent" and the Norris-LaGuardia Act:

"Hence, under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency. (And only ordinary evidence will be required to establish the agent's authority)."

* * * * *

Pages 1626-7:

"Mr. Taft. . . . . .

"The President says that a union will be liable if any of its members engaged in an unauthorized wildcat strike. This is simply not so.

". . . . . .

"The President says the law would expose unions to suits for acts of violence, wildcat strikes, and other actions, none of which were authorized or ratified by them. This is not so. We have simply provided

that unions are subject to the same general laws of agency as any other corporation or citizen in determining their liability for the acts of the agents."

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE:

"RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

"(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

". . . . . "

APPENDIX D

INSTRUCTION NO. 2 OFFERED BY DEFENDANT

"The Court instructs you that the law regards the United Mine Workers of America as an entity separate and apart from its District 30, and neither District 30 nor any officer, field representative or other employee had any general power or authority to act for or bind the United Mine Workers of America in calling, promoting, participating in, ratifying, encouraging or adopting a strike or in picketing activity in connection therewith.

Likewise, the United Mine Workers of America is regarded in law as an entity separate and apart from any local union affiliated with it. The members and officers of the local union were not agents of the United Mine Workers of America merely by reason of their membership or by reason of the fact that they held office in a local union.

685 No wrongful act, if any, which a member or officer of the local union, or any officer or field representative or other employee of District 30 may allegedly have done can impose any liability in this case on the United Mine Workers of America, unless [illegible]intiff establish by clear evidence that the person or persons performing such alleged act or acts, if any, acted as agent or agents of the United Mine Workers of America while acting within the scope of the employment or authority"

(The Court declined to give the above instruction.)

INSTRUCTION NO. 3 OFFERED BY DEFENDANT

Plaintiff alleges that this Court has jurisdiction in the instant action under Section 303 of the Labor Management Relations Act, 1947. In order for the labor union involved in this case to violate those provisions, there first must be a labor dispute between the labor union and an employer called a primary employer, and the labor union must have

undertaken to win that labor dispute by bringing pressure upon, or coercing, the primary employer by inducing em-
ployees of a third party, called a neutral employer,
686 with whom it has no labor dispute, to engage in a
strike or concerted refusal to handle the products of the primary employer, and, secondly, the Union must have for its object one of the matters stated below.

Therefore, before you may find in plaintiff's favor in this case, the plaintiff coal company must show, by clear proof, that the United Mine Workers of America, acting by and through its agents, had a labor dispute with plaintiff as a primary employer and that it induced or encouraged employees of other coal producers or persons to engage in a strike or a concerted refusal to handle plaintiff's coal; but even if you so find, still you may not find the defendant Union guilty of violating the provisions of Section 303 unless you further find, by clear proof, that the Union's conduct had for its object forcing or requiring plaintiff to recognize or bargain with the defendant Union as the representative of the plaintiff's employees, or to force such other coal producers and persons to quit doing business with plaintiff.

Or the jury may find in plaintiff's favor in this case if
the plaintiff coal company shows, by clear proof, that
687 the United Mine Workers of America, acting by and
through its agents, had a labor dispute with some coal operator other than plaintiff, as a primary employer, and induced or encouraged plaintiff's employees to engage in a strike or refusal to handle the coal of such other coal operator, and if the coal company further shows, by clear proof, that the Union's conduct had for its object forcing or requiring plaintiff, as a neutral employer, to quit doing business with such other coal operator or person, or forcing or requiring such other coal operator or person to recognize or bargain with the defendant Union as the representative of that employer's employees; but, unless you believe from the evidence in this case that the Union's

conduct had such an objective, then you must find for the United Mine Workers of America."

(The Court declined to give the above instruction.)

INSTRUCTION NO. 4 OFFERED BY DEFENDANT

"The right of employees to organize and to form, join and assist a labor union, to bargain collectively through representatives of their own choosing, to strike and
688 picket and engage in other concerted activities for the purpose of mutual aid and protection are fundamental rights recognized in the law of the land.

In the instant case, District 30 had the right to picket the mines and tipple of the plaintiff for the purpose of organizing plaintiff's employees and inducing plaintiff to recognize the Union as the bargaining representative of its employees, and to induce and encourage plaintiff's employees to strike and cease producing or handling plaintiff's coal for such purposes, even though these acts interfered with plaintiff's operations and business. And if, from a preponderance of the evidence in this case, you believe that District 30's activities were for such purposes, or either of them, then you will find for the defendant, United Mine Workers of America."

(The Court declined to give the above instruction as a whole, but stated that a portion thereof would be given in substance.)

INSTRUCTION NO. 5 OFFERED BY DEFENDANT

"The Court instructs you that in an action brought under Section 303 of the Labor Management Relations Act,
689 in determining whether there has been any violation thereof, evidence of any violence, if any, is not material and even though you may believe from a preponderance of the evidence in this case that acts of violence were committed, and, further, that such violence was committed by agents of the defendant, United Mine Workers of Amer-

ica, still you may not find United Mine Workers of America liable or guilty of unlawful conduct under such law."

(The Court declined to give the above instruction.)

INSTRUCTION NO. 6 OFFERED BY DEFENDANT

"The Court instructs the jury that even if you believe from the evidence that acts of harassment and threats of violence and violence were committed by agents of the defendant, still you may not hold the United Mine Workers of America responsible or liable for such conduct unless you believe upon clear proof that the United Mine Workers of America actually participated in, or actually authorized such acts, or ratified them after actual knowledge thereof."

(The Court declined to give the above instruction.)

INSTRUCTION NO. 7 OFFERED BY DEFENDANT

"The Court instructs the jury that even though
690 you may believe from the evidence in this case that wrongful conduct occurred at mines and properties of persons and companies other than those of the plaintiff, still you may not find defendant, United Mine Workers of America, guilty in this case unless you further believe, from the evidence, that wrongful conduct also was committed on the premises of, and to, the plaintiff and to plaintiff's employees and that such wrongful conduct was committed by agents of the United Mine Workers of America acting within the scope of their authority."

(The Court declined to give the above instruction as a whole, but stated that it would be given in substance, other than the limitation in the phrase "committed on the premises of the plaintiff.")

INSTRUCTION NO. 8 OFFERED BY DEFENDANT

"The Court instructs the jury that should it believe plaintiff is entitled to an award of damages, you must limit

your assessment of damages to injuries sustained by
691 the plaintiff company and you shall not consider or include any injury to other persons or companies and to the property of other persons or companies."

(The Court sustained the motion to give the above instruction.)

Mr. Combs: For the record, Your Honor, we object to the Interrogatory No. 1 to be answered by the Jury and say for reasons that it does not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs. We think that the Court should have given Instruction No. 3 offered by the defendant as a correct statement of the law.

We further object to the interrogatories to the jury dealing with the question of measure of damages as not correctly stating the law concerning damages under the evidence adduced by the plaintiffs, and make a general objection to the interrogatories.

• • • • • • • • • • •

692 INSTRUCTIONS TO THE JURY

The Court:

Ladies and Gentlemen of the Jury: I feel like I hardly know where to begin in discussing with you this case and in discussing your duties in respect to this case. But I think the first thing that we ought to undertake is a clear understanding of what the parties have fallen out about and what they are trying to accomplish, and a clear understanding of the issues that you are to decide.

A Jury performs a most important function when two people fall out and have a dispute over what the truth is, what the facts are. One testifies one way, the other testifies another. Our system is simply to submit the issue under the evidence that is presented to a qualified group of twelve citizens of our country. There is where your province is. You are to determine, as between these conflicting conten-

tions that have been presented in this case, just what the truth is.

Now it is claimed by the plaintiffs in this case that the defendant violated the law of the United States in that, for the purpose and with the object of forcing these plaintiffs to join the union, the United Mine Workers, the defendant did induce or did encourage the employees of coal-producing companies, who were engaged in hauling
693 or supplying coal to the tipple operated by the plaintiff, Sunfire Coal Company, to engage in a concerted refusal—that is, they induced these people or encouraged these people to engage in a concerted refusal to transfer coal from the mines of their employers to the tipple of the plaintiffs. That's what they charge first, that they undertook to interfere with their supply of coal by inducing the truckers upon whom they depend to get the coal and to carry on their business, and that in that respect they violated the law of the United States.

Further, it is charged, and the question that you are to decide—these people deny that they had any such purpose; that is, the defendants deny that there was any such thing involved in this strike and in this picketing of the plaintiffs' property.

The plaintiffs further say that they not only undertook to persuade or to encourage the truckers to quit supplying them, but that for the same purpose, forcing them to sign this contract, this contract that they felt and told the defendants in their meeting that they couldn't live under, that the small coal operators who sold them the coal couldn't live under it; that it required these defendants to buy coal only from operators who operated in accordance with the terms of this contract; that they couldn't pay forty
694 cents a ton to the Welfare Fund in addition to their other expenses.

That is the problem that we are to determine. I started to say that the second object and purpose was to take the

employees away from the plaintiffs that were there engaged in operating their business, for the purpose of compelling, inducing and coercing the plaintiffs to sign the contract.

I'm not going to take time to discuss whether this case ought to be decided on sympathy. I heard a very interesting appeal by the attorney for the union for your sympathy for the union. I'm not going to take any time in discussing that, because everybody recognizes that it is not a legitimate argument when the issues are presented to the Jury.

I am going to submit these issues that are involved here to you in as simple interrogatories as I can. I'm going to submit it on interrogatories that you can read and understand and answer "yes" or "no". I want you to understand these interrogatories because that is important in order that you perform the duties that rest upon you. I'm not going to make an address on the subject of the labor laws, or on the subject of the right or justice of some of the laws. That is not the province of the Court. We are undertaking to deal with one single case, and
695 that's this case.

Let's see what the first question is that is presented to you for your determination:

"Do you find from the evidence that in March 1959, and thereafter during the period of the strike referred to in the testimony, the Defendant, United Mine Workers of America, through its officers, agents, representatives or members, did (1), for the purpose and with the object of forcing or requiring the Plaintiffs to join the Union, United Mine Workers of America, induce or encourage employees of coal producing companies who were engaged in hauling or supplying coal to the tipple operated by Plaintiffs, Sunfire Coal Company and Ashlo Coal Company, to engage in a concerted refusal to transfer coal from the mines of their employers to the tipple of the Plaintiffs . . . . . ."

You have heard the facts in regard to what they did and what they undertook to do. I'm not going to review those

facts. They have been gone over and over and over by the attorneys for the parties. They have reviewed for you the fact that for some reason the defendant, by its agents and servants—because the officers of the union and the
696 officers of the district and the members of the union and the members of the district are largely identical as far as rights and powers and duties are concerned, and as far as representation of the union is concerned. But what happened? You have heard the testimony as to the —Well, I say I'm not going to review it. I can't hardly discuss the question without reviewing it to some extent, because it is undisputed that some of the truckers were threatened. Well, I say it is undisputed; I guess it is disputed, but you heard how they were threatened, how they were cursed, how to drive in there one time they were obstructed by the scattering of roofing nails on the road. There was proof that one of these pickets came out when they were picking them up and trying to clear the road and said "Let those nails alone."

What was the object of all of this picketing? Was it to have a peaceful consideration of the merits of the contract and to induce somebody to conclude that it was the right thing to do, or was it to force somebody against their will and due to the fear of what might happen that they could get them to sign the contract and join the union? Was that the object and purpose of organizing a picket group of three or four hundred men to go to a place up here called Combs where there was a tipple operated by a few
697 employees? Mass picketing of three or four hundred men at one place. Some of them stayed night and day, fed by the officers that were in charge of them, the officers of District 30 of the defendant union. Not only fed but paid, vouchers issued for money to induce them to do these things. There is proof that the agents of the union, Mr. Bill Perkins, Mr. Matt Combs and some of the others were present when many of these things happened. You have heard the testimony; I need not go into it. You

have heard the testimony of the men who were actually working in the tipple and trying to carry on the best they could under all these circumstances—testify that three or four of the pickets came up there and pushed them or threatened to push them off the tipple, did make them quit, told them to get out of there, did stop the operation of the tipple.

Now the defendant says "You haven't proved that these men who did it were authorized to do it by the union." The union called this strike. The union organized the pickets. It was the union men that went there and sought to get these plaintiffs to sign the contract. It was the union who appeared at the meeting in Washington and heard the plea
for the small coal mines to have a different kind of
698 contract. Witnesses say that they didn't hear the
officers of the defendant say "If you want to stop the violence, sign the contract." Do you think they did say it? That's for you to decide. You heard the men who testified that that is what happened, and they asked and pled for them to give them some way by which this violence—what violence? According to the defendants there was not violence there. But they begged to have some indication given to stop this violence. What did they tell them? According to the witnesses that have been introduced by the plaintiffs, they said "If you want to stop the violence, sign this contract." Does that leave any doubt in your mind as to the reason for all this mass picketing, as to the reason of all this coming and going? Does it have any bearing upon what happened? Well, you have heard the testimony as to the circumstances bearing upon what took place in the way of injury to the plaintiffs' property. We are not dealing now with the question of measure of damages, but this interrogatory calls upon you to answer and say whether, as the direct and proximate result of this conduct, the plaintiffs suffered injury.

The law of the United States provides that—I'm not going to stop to read it all—that it is unlawful for any

labor organization in an industry affecting com-
699 merce—and there is no doubt about this industry being one that affects commerce; it is not disputed that its products in a large measure go into commerce between the states—it is unlawful for any labor organization to engage in—and this United Mine Workers is a labor organization, has its constitution, has its officers, has its right to own property, has its liability for its illegal conduct. So this law provides that it is unlawful for a labor organization to engage in or to induce the employees of any other employer to engage in or to strike or in a concerted refusal in the course of their employment to try to transport commodities or perform any services, the object thereof is forcing or requiring any employer or self-employed person to join any labor or employer organization. Well, it says it is unlawful. It says further: "Whoever shall be injured in his business or his property by reason of any violation of sub-section (a) may sue in any district court of the United States, subject to the limitations and provisions of Section 185 of this Title, without respect to the amount in controversy, or in any other court having jurisdiction, and shall recover the damages by him sustained and the costs of the suit." Under the limitations and provisons of Section 185, Paragraph E of which says

"For the purpose of this section in determining
700 whether any person is acting as an agent of another person so as to make such other person responsible for his acts—whether they are the agents of the defendant, United Mine Workers of America—the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

So you are called to answer whether or not these things took place as set out in the first interrogatory.

"And if you further believe that, by reason of and as the result of such conduct by the Defendant, its officers, agents, representatives and members, the Plaintiffs sustained damage to their business and property?"

You will answer "yes" or "no" as you find the facts to be. There is a line there for you to answer it. You will answer "yes" that they did or that they did not

"If your answer to Interrogatory No. 1 be "No", it will not be necessary for you to answer any of the remaining interrogatories; but if your answer to No. 1 be "Yes," you will proceed to answer the remaining Interrogatories as directed."

701 Interrogatory No. 2:

"Do you find from the evidence that, as the direct and proximate result of the acts and conduct of the Defendant, United Mine Workers of America, its officers, agents, representatives or members, as described in Interrogatory No. 1, the Plaintiff Ashlo Coal Company sustained damages in loss of profits which it would otherwise have made in its business?"

Did it damage Ashlo in the loss of profits in its business? You have heard the facts. Was it the direct and proximate result of this mass picketing, threats to the condition of affairs that prevailed, the ominous gathering of large bodies of men blocking highways, blocking entrances, scattering of nails upon the highway to keep them from operating, throwing rocks? There is proof that there was shooting, that there were explosions. Those things happened. For what purpose? How did it happen? What was the purpose of any of it? Do you find it was the purpose from all the circumstances are you able to determine from this evidence that the impairment of the business of Ashlo, by the destruction of the tipple and the equipment that Ashlo was using, interfered with the business of Ashlo and was
702 the result and for the purpose and the accomplishment of the purpose for which the United Mine Workers of America gathered their pickets?

If you answer that interrogatory "yes", you will answer the next interrogatory that follows, which deals with the

measure of damages. But if your answer is "no", then you will not answer Interrogatory No. 3. But in either event you will answer Interrogatory No. 4.

No. 3 is:

"What amount do you find from the evidence will fairly and reasonably compensate the Plaintiff Ashlo Coal Company for the loss of profits it is reasonably certain it would have made in the operation of its business under its lease contract with Sunfire Coal Company but for the acts and conduct of the Defendant, United Mine Workers of America, its officers, agents, representatives or members, as described in Interrogatory No. 1, not to exceed the sum of $23,555.40?"

That will present to you a problem of determining what they have lost, which the law says they are entitle . . o recover in damages. Have they been damaged? Has their business been destroyed? Would they have made any
703 profits? You have heard these people controvert the testimony that has been introduced here. It is for the Jury to resolve and determine what the facts are and what your reasonable conclusion is in that respect. You have had it argued back and forth by the attorneys sufficiently for me not to dwell upon it further. I'm going to leave that to you.

The next problem will be to deal with the question of Sunfire Coal Company property.

"Do you find from the evidence that, as the direct and proximate result of the acts and conduct of the Defendant, United Mine Workers of America, its officers, agents, representatives or members, the Plaintiff Sunfire Coal Company sustained damages to its coal tipple only to the extent that the tipple was susceptible of being repaired and restored to as good condition as it was before the damage, and sustained further damage by the loss of the rentals of its tipple during the period necessary for its repair and restoration?"

You will have to decide whether that happened and whether it is the necessary and proximate result of the conducts that are described in Interrogatory No. 1, and make up your mind whether you should answer it
704 "yes" or "no" after considering it in the light of the evidence that has been presented here. If your answer to No. 4 be "yes", you will proceed to answer No. 5; but if your answer to No. 4 be "no", you will not answer No. 5, but will proceed to answer No. 6.

No. 5 presents the question to be answered in the event you find that the tipple was susceptible of being repaired and restored to as good condition as existed before the damage occurred to it.

"What amount do you find from the evidence will fairly and reasonably compensate Plaintiff Sunfire Coal Company for the necessary expenses of repairing and restoring its tipple described in the testimony within a reasonable time after April 25, 1959, together with such loss of its rental value as Plaintiff Sunfire Coal Company sustained from April 25, 1959, until the expiration of a reasonable time necessary for the repair and restoration thereof, not to exceed the sum of $492,509.49, the amount claimed?"

No. 6 presents the other alternative if you find that it wasn't susceptible of being repaired within a reasonable time and at reasonable expense.

705 The interrogatory reads thus:

"If you find from the evidence that the tipple of the Plaintiff Sunfire Coal Company was, by reason of the acts and conduct of the Defendant, United Mine Workers of America, its officers, agents, representatives or members, as described in Interrogatory No. 1, and as the direct and proximate result thereof, damaged to such an extent that it was not susceptible of repair and restoration to the condition that it was before such damage, at reasonable expense, then you will state what amount represented the

fair and reasonable market value of the plaintiff's tipple at the time and place, when and where, it was so damaged, not to exceed the sum of $400,000?"

The reasonable and fair market price of the tipple is the amount that it would bring at a fair, voluntary sale; and a fair, voluntary sale is a sale at which the seller is willing to sell and the buyer is willing to buy, and the amount would represent the purchase price in negotiation between a willing buyer and seller for the property described.

Now there has been something said that I must comment upon briefly. There is no question but that the law recognizes the right, in the course of this important pro-
706 cedure that we refer to as "collective bargaining" between labor and employers—there is no question but that the law seeks by means of strikes and by means of picketing to promote fair collective bargaining. And strikes, the use of pickets, is a very important device for laborers to put forth their claims, or to express their grievances. And so long as those devices are utilized peaceably, they do serve a useful purpose. But whenever they become the vehicle of violence, a vehicle of force, a vehicle in which people are put on such pressure that they can't resist for fear—fear is a terrible thing—and when that happens, when they are used to such extent as that and that use is made under such facts and circumstances that these facts and circumstances demonstrate, a defendant is responsible for that use and the defendant is responsible for the damages that necessarily follow.

The burden of proof is upon the person that makes the charge—that is, upon these plaintiffs. They must establish the burden that they undertook to support by a fair preponderance of the evidence. You will have to determine as to whether they have done that. Preponderance of the evidence doesn't mean the greatest number of witnesses; it doesn't mean merely something that was most probable

It means that which the greatest weight of the evi-
707 dence and testimony supports. Sometimes the testi-
mony of one witness, by reason of the appearance of sincerity and truthfulness, will overcome the testimony of dozens of people who don't give such appearance of truth and sincerity.

You know, it's a human sort of problem. You have to decide that problem. I can't decide it for you. I can't say what you ought to do about it when the testimony is conflicting. But the burden, nevertheless, to establish a fact that is involved rests upon the person who makes the charge, and that is the plaintiff here.

You are to be the judge of the credibility of the witness, who is telling the truth and who isn't. It's an important and a terrific problem. I always feel sympathy for a Jury that has that sharp problem to deal with, but, nevertheless, we have found no better way of determining it than by the verdict of a competent Jury.

Now any comments that I have made upon the facts, if I have appeared to make any comments upon the facts, indicated any views as to how the facts should be determined, I want to assure you that you are not bound by it. You are not bound by anything I say along that line. You
are bound, as has already been said to you in the
708 arguments of the lawyers, by the law as I have given it to you. But as far as any comments I have made upon the facts, you may disregard them, pay no attention to my views, because your views and your conscience is what must determine the issues that are presented here.

There was some evidence that was produced here about similar occurrences in other parts of the territory. There is some evidence of court procedures that resulted in some body being imprisoned and fined. Those matters may be considered. They were introduced for your consideration, but they do not constitute direct proof; they do not constitute proof that is substantive in support of these claims.

They are worth considering if you think they are worth considering. They may be considered as bearing upon whether or not there was a common plan in regard to the operations of this strike and the operation of the pickets. You can't award any damages for any injury that was done to anybody except such as may have been done, if you find such was the case, to these plaintiffs.

. . . . . .

709 The following occurred at the bench out of the hearing of the Jury:

Mr. Combs: If the Court please, the defendant, by counsel, excepts to the charge given as follows:

The Instructions erroneously state the relationship between the defendant United Mine Workers and its District 30.

The Court erred in refusing to give the Instructions as tendered by the defendant in its Instructions Nos. 1 and 2.

The Court erred in its Instruction with reference to the secondary boycott provision, as sued upon in the complaint, in that the Court did not define boycott in the terms of the Statute, that is, Section 303 of the Labor-Management Relations Act of 1947; and the Court erred in refusing to give Instruction No. 3 with reference to the boycott as tendered by the defendant.

The Court erred in its charge with reference to his comments upon the payment of the forty cent royalty to the United Mine Workers of America Welfare and Retirement Plan, in that the evidence in the record here shows that these companies, the Sunfire Coal Company and Ashlo
710 Coal Company, were non-producing companies, and the contract in evidence in regard to payment to the Welfare Fund, by its express terms, only relates to producing companies.

The defendant renews its objection to the proposed in-

terrogatories to be answered by the Jury on the same grounds and for the same reasons heretofore given.

The Court erred in its refusal to give Defendant's requested Instructions numbered 4, 5, 6 and 7.

The defendant renews its objection to the failure of the Court to give these Instructions on the same grounds and for the same reasons heretofore given to the Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 447.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

SUNFIRE COAL COMPANY, a Corporation, and ASHLO COAL COMPANY, a Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents Sunfire Coal Company and Ashlo Coal Company in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTIONS PRESENTED.

1.

Was the evidence in this case (a) sufficient to support a finding that the Union had engaged in a secondary boycott and (b) sufficient to support a judgment that the Union was liable for the damages of which the plaintiffs complained?

2.

Did the petitioner comply with Rules 51 and 49(a) of the Federal Rules of Civil Procedure in such manner as to preserve its right to complain of instructions given, or refused to be given, or interrogatories submitted by the trial court to the jury, and if so, were there such material errors in the trial court's instructions or interrogatories as to justify the granting of a Writ of Certiorari?

3.

Whether, under the evidence, the appellate court correctly appraised Sunfire Coal Company as a person who is permitted to maintain an action as a plaintiff under Section 303 of the Labor-Management Relations Act, 1947?

4.

In an action under Section 303, Labor-Management Relations Act of 1947, against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain tactics of defendant constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiffs' businesses violative of state common law, did the district court have jurisdiction to determine liability under the common law or non-federal grounds asserted in support of the single cause of action?

STATEMENT OF THE CASE.

The Evidence.

Because they consider the petitioner's resumé of facts to be argumentative and euphemistic, respondents feel justified in correcting inaccuracies and omissions by a recital of facts considering the evidence most favorable to them.*

When amendments to the National Bituminous Coal Wage Agreement were negotiated in 1958, the respondents took no part in the negotiations, nor did they have any opportunity to negotiate a contract of their own (4b, 36a).** After the negotiation of the amended contract, United Mine Workers of America (hereinafter called UMW), through its various districts, in January, 1959 sent contract termination notices to former operator signatories, advising that the old contract was being cancelled, and offering to negotiate a new contract (223a, 229a-230a, 298a). Since neither had been a signatory to the old agreement, neither of the respondents received the quoted notice of cancellation (3b). As for the insincere offer to negotiate a new contract, it was made clear that, after December 1, 1958, the time for negotiation was past (36a, 132a). Significant among the negotiated amendments in this new "one contract" was a covenant to the effect, as

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* A principle sanctioned in *Taylor v. Mississippi*, 319 U. S. 583; *McFall v. Tooke*, 308 F. 2d 617, 619.

** Numeral followed by the small letter "b" refers to the page of the appendix filed in the Court of Appeals by the respondents (plaintiffs-appellees), and here certified upon appeal. Numeral followed by the small letter "a" refers to the page of the appendix filed in the Court of Appeals by the petitioner (defendant-appellant) and here certified upon appeal. The capital letter "A," followed by numeral refers to the page of the appendix bound with the petition for writ of certiorari, filed herein by the petitioner (who was defendant-appellant in the Court of Appeals).

a practical matter, that operator-signatories would not do business with other operators unless they were also signatories (16b).

Carson Hibbetts had been president of District 28, and stationed in Norton, Virginia (218a). On March 1, 1959, the International Union dispatched him to Kentucky to become president of "provisional" District 30, a seven-county area in Southeastern Kentucky (219a-220a). To persuade operators to sign the new contract, Mr. Hibbetts promptly set up the outline of a program to start picketing (223a). To promote this program, Mr. Hibbetts was authorized by the petitioner to "use his staff in District 30" (14b). This he did, delegating to field workers Matt Combs and Bill Perkins authority to work directly with the pickets (224a).

Pursuant to plans previously discussed in union meetings called by Mr. Hibbetts, on the morning of March 16, 1959, a large group of men met at Combs, within a few hundred yards of the Sunfire tipple (299a). It was estimated that this assemblage numbered 1500 to 1800 (176a), and when they started on a tour of the coal fields they comprised 250 to 300 carloads (106a). They were so numerous and traffic was so congested that Ashlo's manager spent two hours driving three miles in a futile attempt to reach the tipple (26a). When he finally did reach the property, much later in the day, he found pickets "all over the place," and when he was spotted by Bill Perkins, who was in a carload of pickets, Perkins "started hollering; so that whole carload of fellows started hollering and jeering at me, but I didn't pay any attention" (26a-27a).

After this massive group had assembled at Combs and heard an address from their leader, they decided they "would go through the field and see how many mines and so forth were working," so the caravan proceeded through-

out the field, into adjoining Letcher County, and returned to Combs for dispersal about three o'clock in the afternoon (299a). This program continued for some three to five days (108a). According to police observers, pickets numbering in the hundreds made a practice of visiting tipples and loading ramps similar to that of respondents, at which an average of three to five men were employed (109a). As a result of these visits in such numbers, the visited ramps usually closed down their operations (108a). Producing mines apparently were ignored by the pickets (109a), although presumably the primary objective of the campaign (229a, 299a).

After some three to five days mass convoys were discontinued, and petitioner adopted a policy of having pickets meet at a designated point early in the morning, receive their instructions from their leaders, and then separate into various groups which proceeded separately to ramps and tipples in the area (106a-108a). The chief and customary official guiding these movements was Bill Perkins, although Matt Combs was also "occasionally" there (107a). Perkins was frequently present when disorders were in progress, offered little cooperation to police, and demonstrated his control over the groups by dispersing them whenever it suited him to do so (27a, 89a, 111a-114a, 152a, 158a, 159a, 169a, 170a, 216a-218a).

Having separated at their morning meeting place, the various picketing groups, numbering up to 50 or 60 men, proceeded to various tipples, at which places they took their stand, sought to prevent truckers from delivering coal (29a, 33a, 61a, 65a, 67a, 71a-73a, 77a, 88a, 90a, 93a, 96a, 101a, 102a, 171a, 174a-177a, 212a), picketed railway switches and induced railroad crews to desert their trains (28a, 33a, 60a, 67a, 114a, 141a, 142a, 144a, 145a, 147a-149a), and threatened those who incurred their displeasure

(59a, 60a, 72a, 89a-91a, 96a, 102a, 172a, 173a, 178a, 183a, 185a).

Groups of varying numbers were at or in the vicinity of respondents' premises day and night (3b). For approximately a month (23b), these pickets were stationed at the mouth of the access road leading from the main public highway to respondents' tipple, a distance of approximately one-fourth mile (302a). Here they conducted themselves as described above and vilified truck drivers (59a, 72a, 88a, 96a, 177a, 178a, 186a), threw rocks at and into trucks (56a, 67a, 101a, 153a 168a), and engaged in altercations with State Police who were trying to maintain order (112a, 113a, 151a, 152a, 158a, 167a, 168a). About early or mid-April, the pickets were moved from the mouth of the respondents' access road across and to the opposite end of the bridge where another rural road entered the highway, and their picketing activities were continued at that point (23b, 302a-303a).

Numerous truck drivers and others testified that they were "afraid" to carry on their regular duties (71a, 77a, 96a, 170a, 175a, 212a).

Among the pickets who were regularly at Combs, vociferous, and most active were James Morris, Jasper (or Lonnie) Wright, and Clinton Bryant (59a, 64a, 72a, 73a, 89a, 95a, 100a, 173a, 183a, 185a). Also present at Combs on numerous rowdy and menacing occasions was Bill Perkins (27a, 89a, 112a, 152a, 158a, 169a, 216a), and on some occasions one Walter Turner, who threatened a trucker by saying that every man hauling coal would be shot "out of the hills or anyway, that the bushes was green" (89a-90a). The two men to whom Matt Combs or Bill Perkins delegated authority for being responsible for picketing activities at Combs were there with regularity, according to Combs (309a).

On the morning of March 16, Kelly Caldwell who operated the tipple for Ashlo and was not a member of the union, started to work and found a large group of men assembled near the tipple. He talked to Bill Perkins, and asked if he could "do some dead work down there" to which Perkins said "No." Perkins declared to him "there would be no work done until the contract was signed." He did not try to work because he was afraid to (170a).

Because of the confusion and potential danger, respondents made no effort to operate from March 16, to March 28 (28a, 29a, 65a).

On March 30, the employees reported for duty, but were afraid to work or handle coal brought in by truckers, so the tipple was operated that day by such men as could be hired (29a-30a). At this point, some of respondents' employees joined the pickets, explaining that if the union had anything to give away, they wanted to get their share (29a-31a). When operations were begun on March 30, some 150 pickets gathered and four of their number (Oscar Smith, Lonnie Wright, Clinton Bryant and Glenn Caldwell) invaded the tipple, let the crew know that the pickets "didn't like" them working (22b), told them to get off the tipple (185a, 297a), and pushed and herded them off "like a bunch of sheep" (183a). On the following day, pickets numbered from 50 to 300 and "they made a push to come back down on the tipple on us, and there was enough State Policemen got in front of them to stop them" (31a). The respondents' properties "were dynamited about three different times" (32a-33a).

Harassment and intimidation, both of the employees of the respondents and others, continued with increasing intensity. Employees of coal producers were cursed and threatened by the pickets (72a, 96a), and having reached the tipple with trucks, were afraid to come out alone, and

spent several hours waiting to form a group large enough for safety (72a, 77a). Recognized in the picketing crowd were Jim Morris and Lonnie Wright (72a, 95a). Truckers who undertook to remove nails strewn in the access road were threatened by Morris and Wright, Morris having a pistol in a pocket at the time (75a, 76a, 95a, 97a, 98a). Wright's father, a Tennessean, declared they "turned trucks over" where he came from (95a).

Another truck operator said that he and his employees were "finally stopped" because "there was pickets there every day and they finally dynamited the tipple first, and then finally somebody burned it up." Asked how the pickets affected trucking, he said "they interfered with it, blocked the highway, the entrance, going and coming," called the truckers vile names, and "they threatened to drag you out of the truck and kill you" (88a-89a). Among pickets regularly on such scenes were Morris, Lonnie Wright, and Bill Perkins, the last said to be there "near every time" that the trucker "went down there." Perkins was "around the crowd" that was threatening and calling the names (89a). Walter Turner was also a regular among these pickets, and he declared "they was going to kill every fellow that hauled if they didn't quit hauling" (89a-90a). One truck driving employee declared that, because of the pickets, "a lot of days I was afraid to go out and in" (96a). To this same trucker, James Morris (5b) declared that rather than work during the strike he "would steal first," to which the trucker laconically responded "I won't" (97a).

Another trucker, who arrived late one evening, had to leave his truck unattended, came back to find his tires slashed "from side to side with a knife," and part of his coal spilled out. Pickets who had been standing nearby but who had disappeared when he returned included Lon-

nie Wright (100a). Going out, he was rocked (101a). When he came back the next day with the same load of coal, some 200 to 300 pickets had gathered; one jumped on his truck and tried to drag him out while others encouraged and "hollered and told him to drag that son-of-a-bitch out." This effort was unsuccessful because his door was locked and the police got him through (101a-102a).

One of the respondents' employees, attempting to go home from work in a truck with a coal hauler, was intercepted by two carloads of pickets, vilified and intimidated. Among this group were the ubiquitous Lonnie Wright and James Morris (59a). The occupants of the pickets' cars were among the same persons who had been on the picket line near the tipple (60a). He said that the pickets told the employees that if they did not close the tipple down, they "wouldn't get no coal to run the tipple on" (61a).

Charles Edward Campbell who hauled coal for Royal Coal Company, was frequently cursed by the pickets around Combs in general, and Jim Morris cursed him and threatened "I'll get you" (172a-173a).

On another occasion, it was necessary to rescue truck drivers who were being pursued by pickets cursing threats and epithets so loud that they could be heard across the river (178a).

The railroad had similar trouble. Its Sergeant of Police testified of difficulties because "They was picketing our switches." These ranged from small groups up to numbers as large as 50 or 60 (141a). The pickets would station themselves at the switches leading into various coal tipples, and the regular train crew "would get off" so "officials would have to go on and take charge" (141a-142a). These pickets identified themselves by placards as representing UMW (143a). The railroad's traveling en-

gineer said "When the [railroad] employees would not cross the picket lines, we would go in there and place empties and pull loads for the various mines" (144a). This is the same witness who is quoted as saying the railroads rendered the "same service" during the strike as before. Actually, he was asked whether supervisory personnel were "able to render the same service to the mines and tipples as had been rendered before the strike," to which he responded "Yes sir, they were capable men." In the very next two questions, he stated he was unable to say whether or not they were able to furnish cars as promptly or in as regular supply (145a-146a).

Despite the inference of petitioner to the contrary, it clearly appeared that respondents' interference with railroad service *did* impede the business of respondents (28a, 48a, 60a, 67a). At Combs, this official and his associates were subjected to such rough treatment that he says "after we got through this crowd there at Combs my crew quit on me" (145a-146a), although he was able thereafter to persuade them to finish the day's work by promising police help (146a). Another Sergeant of Police for the railroad, along with his crew, found a log on the railroad track, and when they started to move it, were warned by UMW pickets that "if we moved that log there would be plenty of bloodshed" (147a).

Out of disorders, intimidation and violence such as is above described grew (1) an increase of State Police personnel from a normal contingent of 11 men to a total of 125 additional men (105a-106a), (2) an injunction against the petitioner procured by the Regional Director of the National Labor Relations Board (239a-241a), (3) an injunction against the petitioner procured by the Louisville & Nashville Railroad Company (8b-9b), and finally (4) a Governor's order sending the National Guard into the area (114a).

However, before ordering the guard into Southeastern Kentucky, the Governor exerted extreme effort to restore order by other means. Conferences between coal operators and union officials were called and held at Frankfort upon the Governor's request (131a). Out of the first such conference grew agreements to hold a conference in Washington between coal operators and top union officials (131a). The union was represented by its Vice President, Mr. Thomas Kennedy, its assistant to the President, Mr. Tony Boyle, and its Secretary-Treasurer, Mr. John Owens (47a, 130a). At this conference the operators contended that the small mine producer would find it economically impossible to comply with the Wage Agreement as amended, and sought a more lenient contract. The union officials stated that they could enter into but "one contract" (132a), the National Agreement as amended. After this impasse the union officials were asked what could be done to stop the violence and were curtly told by Mr. Kennedy or Mr. Owens, to "sign the contract" (127a, 130a, 135a). Mr. Boyle attended a subsequent meeting at Frankfort, asserting that he had the same authority as John L. Lewis. Mr. Boyle was addressed by Mr. Vego Barnes, the moderator appointed by the Governor, and was asked what could be done to halt the violence and property damage in Southeastern Kentucky. Mr. Boyle indicated that the violence could be stopped by signing the contract (47a, 128a, 131a, 135a).

On April 24, an extremely large number of pickets (estimated by Ash.'s manager as "a thousand"—35a) gathered at Combs, led by Bill Perkins. They blocked the highways and were described as "out of hand". (112a). The Sergeant of State Police called upon Perkins to restore order, but got small response (112a-113a). Someone called that the pickets were "rushing the tipple," and

a number of armed police went down to the access road running under the bridge and intercepted the group (158a). "After quite a bit of talking" it was agreed that a few of the pickets go over to the tipple with a police officer and talk to the officials, which they did without results (35a-37a, 112a, 158a). Something like an hour after the unruly group began gathering at Combs, and after they had been thwarted by the police, they dispersed upon the order of Mr. Perkins (112a-113a). However, before they dispersed, an approaching truck driver heard a picket yell, "Go ahead and let him dump, he won't be hauling there long" (96a).

Wiley Strong, a picket who had been regularly on duty, talked to Mr. Perkins shortly before the group disbanded, and Perkins told him that "we wouldn't have to picket down there any more, that they would take care of it" (216a-217a). Counsel for petitioner was of the impression that Mr. Perkins meant to imply that outside pickets would no longer be necessary, but that local pickets would take over the duties, but Mr. Strong made it clear that this was not what Perkins said. On the contrary, he is quoted as telling Strong that they would "Take care of the mine" (218a).

As prophesied, and suggested by pickets even earlier (168a), the tipple burned the next morning shortly after daylight. Water tanks, filled the night before, had been drained (34a).

Mrs. Ruby Baker, a friend of the family of James Morris, testified that on the evening before the Sunfire tipple was burned Morris brought his family to her home, where they stayed all night, but that Morris left and did not return until the next morning (203a-204a). She said that when Morris returned early the next morning, he was dirty, came running through the house, and told her

to go out and get a gun out of his car, and upon his indication as to where it was hidden under the seat, she got out a high powered rifle and brought it into her house and hid it under a mattress (204a-205a). After she had hidden the gun, Morris said he would "guarantee the tipple to go down" and told her and the members of his family to get ready "and we would go down and watch it burn down." With that, the group went to the vicinity of the tipple and saw that it was on fire (205a). Upon reaching the tipple area, Morris left his family with Mrs. Baker, but at some later time came back to her house and got his gun (205a-206a).

According to the guards who were on duty the night before the tipple burned, there was considerable shooting in the direction of the tipple, some of the shooting coming from the direction of the pickets, and some of the bullets hitting the tipple and a nearby building (188a, 189a, 196a, 198a). Also, at some time during that night, there was a "right smart" of dynamiting across the river in the vicinity of the highway (189a).

Trooper John Hill was stationed near the bridge on the morning the fire started (162a). He actually saw the fire start, but before it started he observed "a man running from the area of the left side, my left side, of the tipple." This man went "up a draw just beyond the tipple and up on the mountain out of sight." Hill said the fire started "within fifteen minutes" after he saw the man run up into the mountain (162a).

Police Detective Walter Wood investigated the burning of the tipple, starting at a time when the fire was still burning (163a). He found foot prints behind the tipple, followed the trail with bloodhounds, found where a "person or persons had been sitting," discovered at least two persons' tracks which were followed to a footbridge some

miles away, where the persons apparently got in a car (164a). This car had come back toward Combs (165a). Mr. Wood made it clear that the person or persons so tracked had proceeded in a direction away from the State Police who were stationed at the bridge, and in the opposite direction from that traveled by guards leaving the tipple that morning (6b).

On the relative location of involved and implicated persons, it should be pointed out that James Morris and Lonnie Wright lived on company property near the tipple (79a), and roofing nails strewn in the road just in front of Wright's house (74a) were located on the private access road about 250 yards from the ramp (94a).

As a part of the overall picture leading up to the destruction of the Sunfire tipple, it was also shown that a substantial number of other coal operators, during this period described as "extraordinary" by the Sergeant of the State Police (109a), suffered extensive and sometimes repeated property damage in the form of fires and explosions which damaged or destroyed their mining equipment or tipple facilities (122a, 124a, 125a, 126a, 130a, 134a, 138a, 139a, 140a). These misfortunes were usually preceded by picketing at operators' plants on the part of petitioner's adherents (122a, 126a, 130a, 134a, 138a, 139a, 140a)

SUMMARY OF ARGUMENT.

1.

This Court should not be expected to review voluminous evidence which is conflicting, susceptible of widely varying interpretation, and supported by the verdict of a jury and the judgment of two courts below. Neither is it likely that the Court has failed to comprehend a contention which has been presented to it on four previous occasions in recent months. Nevertheless, should the Court see fit to examine and weigh the evidence in this case, it will be seen that the evidence fully supports a judgment of union responsibility for damages inflicted in violation of Section 303, Labor Management Relations Act, 1947, and in violation of state common law.

2.

The petitioner failed to comply with Rules 51 and 49(a), Federal Rules of Civil Procedure, in such manner as to preserve its right to complain as to the instructions given, the interrogatories submitted, and the instructions refused, by the trial court, and the specific grounds which it now offers for the first time, in claiming error on the part of the trial court, come too late. However, had proper objection been taken, the charge of the trial court to the jury was, as found by the Court of Appeals, "without prejudicial error" (A5). The interrogatories and instructions must be read as a whole from the point of view of the impression they would seem to convey to a jury of laymen, and not in their individual parts. When this test is applied to the charge of the trial court, it is at once apparent that the jury of laymen were told, in language they could understand, the factors involved in this action for damages for the wrongful interference by the petitioner with the businesses

and property of the respondents, both as to the federal ground and as to the common law ground.

3.

Sunfire Coal Company, being an employer with employees and one of the companies which the petitioner was trying to get to sign its new collective bargaining contract, being directly injured by the activities of the petitioner, and being the owner of the property destroyed and damaged by the petitioner, was entitled to maintain an action for damages under Section 303 of the Act, and the lower courts correctly so held. Should a conflict between two opinions in the same circuit be a ground for granting certiorari, the opinion in the Sixth Circuit's *Osborne* case (279 F. 2d 716), referred to by the petitioner, and its opinion in this case are entirely consistent.

4.

Petitioner's attack on the applicability of the doctrine of ancillary or pendent jurisdiction in a case involving an alleged violation of Section 303, Labor Management Relations Act, has been unsuccessfully urged by it in four recent, prior decisions of the Court of Appeals for the Sixth Circuit, in each of which certiorari has been denied. The fact that the common law ground, if tried alone as an independent cause of action in the State court, would have taken the procedural form of a class suit, rather than a suit against a jural entity, does not affect the applicability of this doctrine. The contention that its applicability is affected by the principle of federal preemption has been twice rejected by this Court in cases where the union's activity was marked with violence and intimidation, as is the case here.

THE ARGUMENT.

QUESTION NO. 1.

(a)

Should the Court see fit to review the evidence in this case, that evidence will demonstrate there is justification for a determination that the Union had engaged in a secondary boycott.

In presenting its argument that it did not engage in a secondary boycot, petitioner has framed its Question Presented in such way as to avoid an indication that review of the evidence will be necessary. Despite this, the evidence on the subject is conflicting and is susceptible of widely differing interpretations, in consequence of which a review of that evidence would be necessary to properly resolve the question. Such is not the usual task of this Court. Except where there is some important and impelling reason for so doing, reviewing evidence is not the customary or proper function of this Court.* On various occasions individual members of this Court have expressed reservations about dissipating the time and energy of the Court in weighing evidence that has been subjected to the scrutiny of two courts below.**

Petitioner is here saying that a trial-court finding of activity proscribed by Section 303, Labor-Management Relations Act, 1947, was error, and not supported by the evidence produced. Specifically, petitioner declares that the finding "squarely conflicts with principles and criteria

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* *Houston Oil Co. of Texas, et al., vs. Goodrich, et al.*, 245 U. S. 440; *United States vs. Johnston*, 268 U. S. 220.

** *New York, New Haven & Hartford Railroad Co. v. Henagan*, 364 U. S. 441; *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 518; *Carter v. Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 437; *Wilkerson v. McCarthy*, 336 U. S. 53, 64.

enunciated by this Court's *Local 761, Int. Union of Elec. Workers, vs. NLRB*, 366 U. S. 667."

This is the fifth time that this precise argument supported by this precise citation of authority has been urged upon the Court by this same petitioner. It was presented in a petition for Writ of Certiorari addressed by this petitioner to the Court in *Gilchrist vs. United Mine Workers of America*, 6 Cir., 290 F. 2d 36, cert. den., 368 U. S. 875. It was repeated in a Reply Brief filed by petitioner in the same action. It was presented again by this petitioner in its petition for Writ of Certiorari addressed to this Court in *Flame Coal Company, et al. vs. United Mine Workers of America*, 6 Cir., 303 F. 2d 39, cert. den. 371 U. S. 891. Once more the petitioner directed the Court's attention to it in the Reply Brief filed in the *Flame* case.

While it may be conceded that "there is an absence of precedential value in the denial of certiorari", it is unlikely that this Court has failed to grasp the significance of or properly evaluate a contention so frequently presented.

As indicated in the previous cases, *supra*, neither the adverse litigant, either of the trial courts, or the Court of Appeals agrees with this petitioner's interpretation of *Local 761*. The factual setting in that case, in respondents' opinion, is not faintly comparable to the facts which gave rise to this litigation. In *Local 761*, there was traditional *peaceful picketing* at one of five entrances to a plant, which particular entrance had been set aside for use by employees of independent contractors. The union in that case had a controversy with a single employer: General Electric. It had a single objective: the satisfactory settlement of twenty-four grievances. It was not concerned with other employers, and was not seeking any concessions, benefits or contracts from other employers.

The situation in this case was entirely dissimilar. Here, by its own admission, the Union had at least 176

targets (employers) in its campaign to procure signatories to its then-negotiated contract. It is inferred that these 176 were *all* of its targets, for it is argued that, since there was no showing that any of the 176 were delivering coal to Ashlo, the object of picketing at the Ashlo tipple could not have been designed to cause Ashlo to cease doing business with any of the 176 (petition for Writ of Certiorari, p. 33). This inference, of course, overlooks the fact that neither Sunfire nor Ashlo were among the 176 producers who had "failed to sign the contract," and therefore it would be difficult to explain why pickets were stationed at Ashlo. The obvious answer appears from the record: the pickets were at Ashlo, just as they were stationed at other tipples, for the purpose of choking off the outlet of numerous coal producers with a design to force them to sign a union contract with an organization which had not been certified as the collective bargaining agent for the employees of any of them (8a). To deny that this was "*an* objective" is to deny the only reasonable conclusion that can be reached from this record. The very contract which petitioner was sponsoring betrayed the intent (16b). As pointed out in the statement of the evidence, the pickets did not visit and station themselves at producing mines, but concentrated their activities on ramps and tipples (108a-109a). This produced results: an estimated eleven hundred coal operator signatories (225a).

In *Local 761* the Court was trying to delineate the paths to two goals having inherent elements of conflict. In that case the Court said, in substance, that peaceful picketing at the situs of a primary employer could not be condemned merely because it had the hope, motive, and objective of influencing third persons, including the employees of other employers, to respect its picket line and thereby exert pressures on the primary employer. Even

this permissive relinquishment from the literal interpretation of Section 8(b)(4)(A) was limited to those persons whose work was connected with and necessary to the regular operation of the primary employer's business. It was never suggested that pickets, at any place, could deliberately set out to enmesh other employers and employees in a quarrel not their own, and carry out that enmeshment by threats, violence, and the destruction of property. Rather than being comparable to the situation in *Local 761*, the pattern in this case was more similar to that involved in *NLRB vs. Highway Truckdrivers & Helpers, Local No. 107*, 300 F. 2d 317, where the Court of Appeals for the Third Circuit declared (pp. 321-322):

> "Compliance with these standards, however, at most gives the picketing only presumptive validity. *Local 761 International Union of Electrical Radio & Machine Workers A.F.L.-C.I.O. v. N.L.R.B.*, 366 U. S. 667, 81 S. Ct. 1285, 6 L. Ed. 2d 592 (1961). Even under that doctrine, the Union must conduct its picketing so as to minimize the impact thereof on the secondary employer. *Retail Fruit & Vegetable Clerks' Union*, 116 N. L. R. B. 856 (1956), and where, as here, the Union deliberately enmeshes secondary employers and employees in the dispute, the doctrine has no application. (Citing authorities.)
>
> "Rather than complying with the fourth requirement of the Moore Dry Dock doctrine, the union here, by deliberate acts, made it perfectly clear that the picketing was not limited to the primary employer."

In connection with picketing on the railroad, the petitioner notes with obvious satisfaction that certiorari has been granted in the case of *United Steelworkers of Amer-*

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* * * * that the picketing clearly demonstrate that the dispute was only with the primary employer."

ica vs. NLRB (*Carrier Corporation vs. NLRB*, 2 Cir., 311 F. 2d 135). Petitioner is sanguine in its anticipation of the outcome of that litigation, and joins with that petitioner in the suggestion that the "law which imposes such heavy financial liability on unions ought at least to make clear what their obligations are." It can readily be gathered that this petitioner is suggesting that the Court not only "make clear" the obligations of a union in a situation similar to that in the *Steelworkers* case, but should also "make clear" the obligations of the union in this entirely dissimilar case and, presumably "make clear" such obligations in any and every situation which imposes heavy financial liability on unions. If this is to be the rule, then there seems to be no logical reason why the Court should not also make clear the obligations of other associations, organizations and even individuals in every instance wherein heavy financial liability is imposed upon them. This seems too much to ask.

Petitioner's suggestion that there could be no secondary boycott in the present case because there was no neutral employer is also difficult to reconcile with the record. Under a statute where "*an* objective" is the test, coal producers were neutrals insofar as the union was trying to force respondents into a contract. Ashlo and Sunfire were certainly neutral insofar as the petitioner was trying to organize 176 (or 1100) other employers, unless it can be said that everyone doing any business with the primary employer is non-neutral. The railroad was neutral, unless it can be said that its interest in shipping Ashlo's coal removed it from that category. The truckers were undoubtedly neutral. Charlie Campbell, for instance, was an independent truck operator who had three trucks and employed two drivers (87a). Neither of the respondents had any control over his business whatever (20a, 42a, 88a).

If he, too, was an object of the union's organizing campaign, the technique of its persuasion—opprobrious names and threats of murder—was most peculiar and unorthodox. With respect to the truckers in general, pickets assured Ashlo's manager that if he did not close the tipple down "* * * we will stop the trucks out at the bridge, and if you don't get any coal, I guess you will close it down" (36a-37a).

Though several truckers appeared as witnesses on the trial, not one indicated that he had ever been solicited to sign a contract with the union. Surely it cannot be denied that the truckers were neutrals unless it be argued (as petitioner sometimes does) that the mere fact the truckers were doing business with a producer furnishing coal to Ashlo removed them from the neutral realm. This argument, of course, is not tenable because if everyone who did business with an employer is classified non-neutral, then the language in the Act "to cease doing business with any other person" would be meaningless.

It was respondents' feeling at the time of the trial not only that there was evidence to support a finding that the petitioner had engaged in a secondary boycott, but rather that the evidence affirmatively and positively showed such a boycott, in consequence of which the respondents offered a peremptory instruction on this phase of the case (27b). Respondents are of the same opinion still.

QUESTION NO. 1

(b)

Should the Court see fit to review the evidence in this case, that evidence will demonstrate that there was sufficient instigation and authorization of those acting for petitioner to make the petitioner responsible for the damage to respondents' property and businesses.

Petitioner again contends in this case, as it has in other similar cases, that it cannot be held responsible for the damage to respondents' businesses and properties because there was no positive and undisputed identification of the individuals who burned the tipple, nor any positive and undisputed proof of their authority to act on behalf the Union in doing so.

This, again, calls for review of the evidence by this Court.

A more direct delegation of authority and chain of command could hardly be found. It is not denied that the International Union appointed Carson Hibbetts to head District 30 and the organizing campaign which began there in early 1959 (219a, 14b). It is also admitted that he delegated to Matt Combs and Bill Perkins the authority to handle the picketing (224a, 14b). These men traveled over a wide area (308a) but at Combs they charged John Stubblefield and Steve Fields with the responsibility of being in charge of the pickets there (309a). These sub-lieutenants were said to have been there with regularity (309a). Hundreds of aggressive pickets, of whom James Morris, Jasper (or Lonnie) Wright, Clinton Bryant, and Walter Turner were typical (59a, 64a, 72a, 75a, 89a-90a, 95a, 100a, 173a, 183a, 185a) were the privates and army regulars in this campaign.

It would be absurd to contend that James Morris was not strongly implicated in the evidence as being one

of the participants in the burning of the tipple. He practically told Ruby Baker as much (204a, et seq.). He was missing on the night of the fire (204a), and claimed to have been at his home (289a). That home, incidentally, was near the tipple and between it and the police whom petitioner stresses as having been stationed at the bridge (79a).

Apparently conscious of the frailty of its contention that there was no proof linking Morris to this fire, petitioner asserts that, even if Morris burned the tipple, there was nothing to impute his lawlessness to UMW. This overlooks many pertinent facts. Morris was repeatedly active with the pickets (59a, 64a, 72a, 75a, 89a, 95a, 173a). He was a member of the union (290a), and receiving benefits from it (288a-289a). His duly authorized leader, Bill Perkins, was often present when disorders were in progress, and his cooperation with police was nil (27a, 89a, 112a, 152a, 159a, 169a, 216a). Morris' activities were not of a local and personal nature. At 2:45 in the morning he was several miles away from Combs in a truck with Walter Turner, "fishing," but riding in a vehicle that had considerable ammunition but no fishing tackle (80a, 21b). This same Walter Turner was the person who threatened at Combs that truck drivers would be shot if they continued to haul coal (89a-90a). As early as March 31, mobs of pickets at the Sunfire tipple were howling "burn it down" (168a). The day before the tipple burned, pickets threatening a truck driver cried out "Go ahead and let him dump, he won't be hauling there long" (96a). Also the day before the tipple burned, the duly commissioned and subsequently appreciated* Bill Perkins told one of his

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* Subsequent to his good services, Mr. Perkins was made International Representative of UMW (221a) after pleading guilty to violation of the court's injunction proscribing certain behavior during the strike, and after serving a term in jail for that offense (238a).

pickets that it would not be necessary to report for picket duty at the Sunfire tipple any more because "They would take care" of it (216a-217a).

Also it is quite possible that the jury might have considered as more than merely coincidental the fact that during this same "organizing" campaign, conducted by the same leaders of respondents' organization, Roland Price suffered the burning of a scale house at one location, and a tipple at another (122a); Kermit Campbell had a locomotive and light house "blowed up" (124a); London Sexton "had three tipples to be blowed up" (125a); Marion Ritchie lost three tipples by fire and explosion (126a); Dick Johnson had his mining equipment "blown up" (130a); Stamper Collins had a large auger "dynamited" (134a); Jack Blair had all of his deep mining equipment blown up (138a); the railroad line leading to the tipple of Virginia Collins was dynamited seven times (139a); and Bill Farley, though operating a union mine, nevertheless had pickets and his "auger got blowed up in May" (140a). One would hardly describe as reckless the statement of Sergeant Willard Mitchell that this period was "extraordinary" (109a).

While this eventful campaign was under way, and being supported by the petitioner to the tune of well over a million dollars in a period of less than four months (14b-15b), the district court found it necessary to issue two injunctions enjoining good behavior upon the petitioner and its members (8b-9b, 239a-241a), the State Police found it necessary to increase their forces in the area from the customary 11 men to a total of 136 (105a-106a), and the Governor considered the situation sufficiently serious to send the National Guard into the district (114a).

Finally, it is worth noting that the very highest officials of UMW callously declared that the way to stop the violence was to "sign the contract" (47a, 127a, 128a, 130a, 131a, 135a).

From all of this, it was certainly reasonable for a jury to conclude that the mischief done by Morris and his unidentified companions was done with a definite prescience on the part of the petitioner's duly delegated agents, and with the express or tacit consent and approval of the petitioner.

In *Delaney v. United States*, 263 U. S. 586, this Court was dealing with a man's liberty, surely as important as the rights of the petitioner in this litigation. It was there said (pp. 589-590):

> "Petitioner attacks the judgment as not being supported by the testimony, a great deal of which is detailed. The immediate reply is that the probative sufficiency of the testimony has the support of the District Court (in which is included the verdict of the jury) and of the Circuit Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents."

To like effect is the Court's statement in *United States v. Johnson*, 319 U. S. 503, 517-518.

QUESTION NO. 2.

Petitioner failed to comply with Rules 51 and 49(a), Federal Rules of Civil Procedure, in such manner as to preserve its right to complain of instructions given, or refused to be given, or of submitted interrogatories, although had proper objection been taekn, complaint of petitioner on this ground is without merit.

Under Subdivision IV of its Reasons for Granting the Writ, the petitioner complains of error with regard to Interrogatory 1, as given by the trial court, and as to the trial court's refusal to give its offered Instructions 3, 4 and 5. In this regard, the Court of Appeals reached the following conclusion (A5):

> "While we feel that the charge of the trial court to the jury was without prejudicial error, on the present record it is unnecessary to pass upon that question, or to consider the propriety of the trial court's rulings on interrogatory 1 and its refusal to give certain instructions requested by defendant. Rule 51, F. R. Civ. P., precludes a party from assigning as error the giving or failure to give an instruction to the jury unless he has objected thereto before the jury retired to consider its verdict, 'stating distinctly the matter to which he objects *and the grounds of his objection.*' (Emphasis supplied.) Not having stated such grounds, defendant may not now be heard to complain. Palmer v. Hoffman, 318 U. S. 109, 119, 63 S. Ct. 477, 483 (1943); McPherson v. Hoffman, 275 F. 2d 466 (6 C. A., 1960)."

In undertaking to contradict the Court of Appeals on this point, the petitioner refers to these specific record citations: "333-36a, 337a, 348a-9a" (Petition, 46). The first citation (333-36a) refers merely to the group of instructions which were offered by the petitioner. The second citation (337a) refers to the following statement:

(337a) "Mr. Combs: For the record, Your Honor, we object to the Interrogatory No. 1 to be answered by the Jury and say for reasons that it does not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs. We think that the Court should have given Instruction No. 3 offered by the defendant as a correct statement of the law."

The third citation (348-9a) refers to the following statements:

(348a) "The Court erred in its Instruction with reference to the secondary boycott provision, as sued upon in the complaint; in that the Court did not define boycott in the terms of the Statute, that is, Section 303 of the Labor-Management Relations Act of 1947; and the Court erred in refusing to give Instruction No. 3 with reference to the boycott as tendered by the defendant."

(349a) "The defendant renews its objection to the proposed interrogatories to be answered by the Jury on the same grounds and for the same reasons heretofore given.

"The Court erred in its refusal to give Defendant's requested Instructions numbered 4, 5, 6 and 7.

"The defendant renews its objection to the failure of the Court to give these Instructions on the same grounds and for the same reasons heretofore given to the Court."

No other objections appear in the record as to Interrogatory 1, or as to refused Instructions 3, 4 and 5.

Rule 51 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 49(a) of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., permits the court to require a jury to return specific verdicts upon each issue of fact. These questions are to be submitted to the jury in written form, susceptible to brief answers. The rule provides that

> "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

It is submitted that the exceptions taken by the petitioner do not sufficiently comply with the provisions of Rule 51 and of Rule 49(a) so as to permit review of the errors alleged regarding the instructions and the interrogatories, and that the Court of Appeals correctly so held.

In applying the provisions of Rule 51 in the case of *Palmer v. Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645, this Court stated:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

In the case of *Detroit Edison Company v. Striker*, 6 Cir., 65 F. 2d 126, counsel objected to the court's instructions as follows:

> "Our exceptions would be the refusal of the court to give our requests, and each and all of them, and the

portions of the charge insofar as inconsistent with the request."

In holding such objection insufficient, the court stated (p. 127):

> "It is the settled rule in the federal court established by a long line of cases, that general exceptions of the character of the ones here taken cannot be regarded as directing the mind of the court to any specific alleged error, and do not save any questions for review. (Citation of authority.) The failure of counsel to point out to the court in what respect the general charge failed to include the applicable law requested to be given to the jury, and to indicate specifically wherein it was inconsistent therewith, constrains us to refuse now to consider the errors complained of."

See also *Richfield Oil Corporation v. Karseal Corporation*, 9 Cir., 271 F. 2d 709, 721, 722; *Apperwhite v. Illinois Central Railroad Company*, 8 Cir., 239 F. 2d 306, 310; *Johnson v. Chesapeake and Ohio Railway Company*, 7 Cir., 227 F. 2d 858, 861; and *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.*, 8 Cir., 181 F. 2d 880, 886.

In applying the mandate of Rule 49(a), the courts have consistently held that a party waives his right to require the presentation of any other issue of fact not included in the special interrogatories submitted by the trial court by failing to make demand that such other issue of fact be submitted. *Columbia Horse & Mule Commission Co. v. American Insurance Co.*, 6 Cir., 173 F. 2d 773, 774, 775; *Merrill v. Beaute Vues Corporation*, 10 Cir., 235 F. 2d 893, 897; and *Ribeiro v. United Fruit Co.*, 2 Cir., 284 F. 2d 317, 319.

With regard to exceptions taken to the form of a special interrogatory, the courts hold that Rule 51 applies, and that the objections made must specifically call the attention of the trial court to the error claimed. *Penn v.*

Glenn, 6 Cir., 265 F. 2d 911, 912; *Martin v. United Fruit Co.*, 2 Cir., 272 F. 2d 347, 348, 349; and *Filipek v. Moore-McCormack Lines, Inc.*, 2 Cir., 258 F. 2d 734, 736, cert. denied 359 U. S. 927, 79 S. Ct. 605, 3 L. Ed. 2d 629.

While it is the position of the respondents that by reason of the failure of the petitioner to comply with the requirements of Rule 51 and Rule 49(a), it cannot complain as to the instructions given or the interrogatories submitted by the trial court, or as to the failure of the trial court to give requested instructions of the petitioner, nevertheless, respondents will discuss the points raised in this regard.

While counsel for petitioner limited his objection to Interrogatory 1 at the time of the trial to the general ground that "it does not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs," in the petition for certiorari various new and entirely different grounds are asserted in petitioner's attack upon this interrogatory. The grounds now asserted may be summarized as follows: (1) that it is inconsistent with the complaint's allegations; (2) that it is unsupported by the evidence; (3) that it is silent concerning the factor of the "neutral employer"; (4) that it does not enlighten the jury by delineating the essential elements to a Section 303 violation in the language of the opinion in the case of *Local 761, Int. Union of Electrical Workers v. NLRB*, 366 U. S. 667; (5) that in the charge accompanying this interrogatory the trial court emphasized the element of violence and ignored some of the evidence offered by the petitioner with regard to the professed objective of its activities; and (6) that it submitted to the jury a mixed question of law and fact.

At this point it is appropriate to note the well-established rule that an objection raised in the appellate court

on an instruction differing from that raised in the trial court is not properly before the appellate court for its consideration. *Siegfried v. Kansas City Star Company*, 8 Cir., 298 F. 2d 1, 7, *Solomon Dehydrating Co. v. Guyton*, 8 Cir., 294 F. 2d 439, 445; and *Chaney v. Slone*, Ky., 345 S. W. 2d 484, 486.

Rule 49(a) provides that where written questions are submitted to the jury for the return of a special verdict "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." In considering the correctness of an interrogatory submitted hereunder, the rule pertaining to instructions generally is applicable, that is, that the interrogatory is not to be read apart from the instructions as a whole, but is to be considered from the point of view of the impression it would seem to convey to a jury of laymen in the context of the entire charge. *L'Urbaine Et La Seine v. Rodriguez*, 5 Cir., 268 F. 2d 1, 5; *Southern Railway Company v. Jones*, 6 Cir., 228 F. 2d 203, 211.

The trial court complied with the requirement of Rule 49(a) and gave a charge to the jury which instructed and enlightened them on respondents' basic cause of action; the wrongful interference with their businesses, and the supporting grounds based upon violation of the federal statute and upon violation of the common law of Kentucky, as well as upon the issue of damages. The court then, in further compliance with the rule, reduced the factual issues to questions, simple in form, in terms readily comprehensible to the jury.

Petitioner complains of the use of the phrase "to join the Union," saying that this phrase should be "to sign the contract with the Union;" however, it proposes that this phrase be considered only in the context of Interrogatory

1 and not in the context of the court's entire charge. This argument is similar to the one made in the case of *L'Urbaine Et La Seine v. Rodriguez*, 5 Cir., 268 F. 2d 1, wherein one of the main issues of fact was whether one of the defendants was an independent contractor or was an employee of his co-defendant. In submitting interrogatories to the jury, the trial court spoke in the terms of "servant," and upon appeal it was urged that this was error, as the term "servant" was not the test of the independent contractor versus employee relationship. In rejecting this argument, the appellate court pointed out that you could not read the interrogatory apart from the instructions as a whole, and that when read in the context of the charge the use of this term alone was not misleading to the jury, and, to the contrary, stated that (p. 5):

> "* * *[T]he Judge, far from erring, displayed great resourcefulness in the flexible usefulness of a charge and verdict which gets the best out of a general charge and special issue verdict while overcoming or minimizing the shortcomings of each when used alone."

When Interrogatory 1 is considered in the context of the whole charge, it is apparent that the phrase "to join the Union" and the phrase "to sign the contract" were used interchangeably and were meant by the court, and understood by the jury to mean, to induce or compel the respondent companies to become union operations. In his charge the trial court refers to the purpose of the claimed inducement being "with the object of forcing these plaintiffs to join the union," then in a continuation of this part of the charge stated (338a, 339a):

> "The plaintiffs further say that they not only undertook to persuade or to encourage the truckers to quit supplying them, *but that for the same purpose, forc-*

> *ing them to sign this contract*, that they felt and told the defendants in their meeting that they couldn't live under, that the small coal operators who sold them the coal couldn't live under; that it required these defendants to buy coal only from operators who operated in accordance with the terms of this contract; that they couldn't pay forty cents a ton to the Welfare Fund in addition to their other expenses." (Emphasis added.)

Respondents find it hard to apprehend that it can be seriously argued that the jury might have been misled by this interrogatory into believing that it was necessary for them to determine whether the union was engaged in signing up employer-corporations to its membership. However, this is what the petitioner urges here, and says further that there is no evidence to support the proposition that the union was engaged in such activity. It is submitted that this argument is without merit.

Mingled with the attack on Interrogatory 1 is the argument that the trial court should have given petitioner's Instruction 3. While counsel for petitioner took only a general exception to the court's refusal to give this instruction, it is now urged that it should have been given to enlighten the jury on the necessity of a "neutral employer" being involved in the labor dispute, and to further enlighten the jury by delineating the essential elements to a Section 303 violation consistent with the language of the opinion in the *Local 761* case. Petitioner maintains that the trial court was required to use technical language or "language of the statute" in instructing the jury concerning a Section 303 violation. To the contrary, the law is that such practice is not to be commended. *LaPresti v. Goodall Oil Co.*, 7 Cir., 290 F. 2d 653, 655; *Moore v. Louisville & Nashville Railroad Company*, 5 Cir.,

223 F. 2d 214, 217. The rule for testing the correctness of an instruction is well-stated in the case of *Government Employees Insurance Co. v. Davis*, 5 Cir., 266 F. 2d 760, at page 765:

> "The test for the correctness of an instruction does not lie in the indulgence which a lawyer in his office with the aid of his books, or the trial and appellate courts with the benefit of briefs and arguments of counsel, give to instructions, but as to how the instructions will naturally be understood by the average men composing juries."

And again, by Judge Wyzanski, in the case of *Cape Cod Food Products, Inc., v. National Cranberry Association*, D. C. D. Mass., 119 F. Supp. 900, at page 907:

> "[T]he object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigmarole of words, but to try to make jurors who are laymen understand what you are talking about."

When this test is applied to the charge of the trial court, it is at once demonstrated that the jury of laymen were told, in language that they could understand, the factors involved in this action for damages for the wrongful interference by the petitioner with the businesses of the respondents, both as to the federal ground and as to the common law ground.

A reading of Instruction 3 offered by the petitioner, and properly refused by the trial court, and a consideration of petitioner's argument that violence is immaterial in seeking to accomplish its professed objective, indicate that the petitioner is insisting upon trying this case under the theory that it must stand or fall upon the point of whether or not, under the particular facts, petitioner violated the secondary boycott provisions of Section 303. This

has been unsuccessfully urged by it in the *Meadow Creek** case, the *Osborne*** case, the *Gilchrist* case and the *Flame* case.

The last challenge made against Interrogatory 1 is that "it submitted to the jury a mixed question of law and fact"; however, in what respect this is so is not pointed out in the petition. A reading of the interrogatory shows that there is no basis for this argument.

Although failing to indicate to the trial court the grounds for objecting to its refusal to give petitioner's instructions 4 and 5, complaint is now made of its refusal to give these instructions.

Instruction 4 offered by the petitioner covered the subject of the right of the union to picket the businesses of the respondents, to organize their employees and to induce them to strike, even though these activities interfered with respondents' operations and businesses. The trouble with this instruction was that it placed no limitation upon these rights, and under it mass picketing, intimidation and violence, the destruction of property and the like, all contrary to the applicable law, would have been condoned.

The trial court did cover in its charge the right of the union by means of strikes and picketing to promote fair collective bargaining, and stated that strikes and picketing were important, lawful devices for laborers to put forth their claims and to express their grievances (346a). So much of the substance of Instruction 4 as petitioner was entitled to was fairly and correctly covered by the charge

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* *United Mine Workers v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U. S. 1013.

** *United Mine Workers v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881.

of the court, and the petitioner has no valid complaint in this regard. *Gerhart v. Henry Disston & Sons, Inc.*, 3 Cir., 290 F. 2d 778, 795; *Thiringer v. Barlow*, 10 Cir., 205 F. 2d 476, 477.

Petitioner's insistence that it was entitled to have the substance of its Instruction 5, relating to the immateriality of evidence of violence, covered by the charge of the trial court cannot be sustained in view of the nature of the cause of action and the dual grounds supporting it *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 665, 666; and *International Union, U. A., A. & A. I. W. v. Russell*, 356 U. S. 634, 645.

QUESTION NO. 3.

Determination by district and appellate courts that Sunfire was entitled to maintain an action under Section 303 of the Act is correct.

In a brief paragraph under subdivision V of its Reasons for Granting the Writ, the petitioner asserts that the Court of Appeals, in sustaining the Sunfire judgment, failed to follow its own decision in the case of *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716, and, therefore, this conflict between these two opinions of the Sixth Circuit requires the granting of the petition for certiorari. On this point, the Court of Appeals had this to say (A5):

> "In a case where one entity acted merely as sales agent for another, it was held that the principal was without a federally recognized cause of action in *United Mine Workers of America v. Osborne Mining Company*, supra. Defendant relies on that case in arguing that as Ashlo's principal agent Sunfire can not be awarded judgment. This argument is completely untenable because no such agency relationship is disclosed by the record."

That the Court of Appeals was correct in this assertion is obvious. In the first place, Sunfire was not a sales agency selling the coal of Ashlo on a commission basis. Sunfire was the owner of the coal processing plant, including the tipple which was destroyed by fire and the coal washer and storage bin which were damaged by dynamite, and had leased it to Ashlo upon a rental basis of 25 cents for each ton of coal processed (49a-51a). While there was no obligation for it to do so under the lease (49a-51a), to increase the amount of rental income which it was being paid by Ashlo, Sunfire took over responsibility for the sale of Ashlo's coal (40a, 56a). The uncontradicted proof is that Sunfire received no compensation from Ashlo for this assistance in the sale of the coal; that Sunfire only received the 25 cents per ton rental provided for by the lease (52a). It is also uncontradicted that, in addition to its officers, its assistant manager and its bookkeeper, Sunfire had as its employees an engineer and some construction men, (41a), and that Sunfire was one of the companies which the union was trying to get to sign the new contract (46a).

Should a conflict between two opinions in the same circuit be a ground for granting certiorari, it is evident that there is none whatever in the opinion of the Sixth Circuit in this case and its opinion in the *Osborne* case.

QUESTION NO. 4.

Doctrine of ancillary or pendent jurisdiction as followed by lower courts is supported by applicable decisions of this Court.

Petitioner denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U. S. C. A. 187) is joined with a non-federal common law action for tort, saying that the rule of ancillary or pendent jurisdiction is inapplicable because, (1) if the common law ground was tried alone as an independent cause of action in a State court, it would take, in this particular instance, the procedural form of a class suit rather than a suit against a jural entity, and (2) it is precluded by the doctrine of federal preemption.

Basically, this is the same question which has been considered and disposed of, contrary to petitioner's contention, in the cases of *United Mine Workers v. Meadow Creek Coal Co.*, 263 F. 2d 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013; *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716 (C. A. 6, 1960), cert. denied 364 U. S. 881; *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (C. A. 6, 1961), cert. denied 368 U. S. 875.

Specifically, this is the same question, in exactly the same language, as was raised by this same petitioner in its petition for certiorari in the case of *Flame Coal Company v. United Mine Workers of America*, 303 F. 2d 39 (C. A. 6, 1962), cert. denied 371 U. S. 891. The same argument as was made in its petition for certiorari in the *Flame* case is again made by the petitioner in this case. As in the brief in opposition in that case, the following argument is made by way of response.

While petitioner seeks to persuade the Court that the requirement in Kentucky state courts that a union, or other voluntary association, be proceeded against in a class action, rather than sued as a jural entity, is a matter of substance, as distinguished from a procedural matter concerning merely the manner and the means by which a right to recover is enforced, this argument is not supported by the law of Kentucky.

Voluntary unincorporated associations are considered legal entities in Kentucky. In *International Union of Operating Engineers v. Bryan*, Ky., 255 S. W. 2d 471, 474, the Court stated:

> "The distinction between an unincorporated labor union and a corporation is apparent. Although regarded as a legal entity, an unincorporated union is a voluntary association which is not distinct from its individual members, as a corporation from its stockholders."

That the bringing of suit against a voluntary association in Kentucky by class action is merely procedural is demonstrated by the following rulings of the Court of Appeals of Kentucky. In *U. M. W. A. v. Comer*, 159 Ky. 605, 167 S. W. 891, this same petitioner was held responsible for damages arising out of libel, and its argument that it was immune to suit was disregarded in view of the fact that it took no steps to raise a question as to the procedural form of action by which it was brought into court. The same result was reached by the Court in the case of *Hotel, Restaurant & Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S. W. 2d 501.

In the *Flame* opinion, the Court of Appeals specifically ruled upon this question, making this conclusion (303 F. 2d 39, 42):

"Defendant denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 187) is joined with a non-federal common law action for tort.

"This contention has been considered and disposed of, contrary to defendant's contention, in the cases of United Mine Workers of America v. Meadow Creek Coal Co., 263 F. 2d 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013, 79 S. Ct. 1149, 3 L. Ed. 2d 1038; United Mine Workers of America v. Osborne Mining Company, 279 F. 2d 716 (C. A. 6, 1960) cert. denied 364 U. S. 881, 81 S. Ct. 169, 5 L. Ed. 2d 103; Gilchrist v. United Mine Workers of America, 290 F. 2d 36 (C. A. 6, 1961), cert. denied 368 U. S. 875, 82 S. Ct. 120, 7 L. Ed. 2d 76. In Meadow Creek, Judge Martin of this court quoted the district court's conclusion that, 'the claim of secondary boycott and unlawful conspiracy are not separate causes of action, but are merely different grounds to support a single cause of action, the cause of action being the violation by the defendant of the plaintiff's right to be free from wrongful interference with its business.' Citing Hurn v. Oursler, 289 U. S. 238, 53 Ct. 586, 77 L. Ed. 1148, he sustained the district court's retention of jurisdiction to dispose of the entire cause of action.

"A different phase of defendant's attack upon the district court's jurisdiction is its argument that defendant, a voluntary unincorporated association, is not considered, in Kentucky, a jural entity subject to suit, and there being no diversity of citizenship between plaintiff and the officers and members of the union, jurisdiction in the federal court could not attach as to the common law action. However, federal jurisdiction attached here because of the secondary boycott and under Rule 17 (b) F. R. Civ. P. 28 U. S. C. A. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in

damages for its tortious conduct (29 U. S. C. A. § 187). Gilchrist v. United Mine Workers of America, supra (290 F. 2d 39); United Mine Workers of America v. Osborne, supra (279 F. 2d 716)."

Rather than being "a federal question important in the construction and administration of the Act's Section 303," as averred in the petition (p. 48), it is submitted that this is merely a procedural question which under all applicable law is controlled by Rule 17 (b) (1), Federal Rules of Civil Procedure.

But, in addition to the attack on the jurisdiction of the District Court based upon the procedural law of Kentucky, in support of the basic question of the applicability of ancillary or pendent jurisdiction in an action under Section 303, Labor Management Relations Act, petitioner asserts that such jurisdiction is precluded by the doctrine of "federal preemption," and that the ruling of the District Court and the ruling of the Court of Appeals to the contrary is a departure from the decisions of this Court.

In applying the doctrine of ancillary or pendent jurisdiction, the party against whom it is invoked usually makes the contention that his type of action should be an exception to the rule. The Court gives full answer to this argument in the case of *Hurn v. Oursler*, 289 U. S. 238, in response to the question of whether cases involving patents, trademarks and copyrights constitute an exception to the general rule, as follows (p. 245):

"The Siler and like cases announce the rule broadly without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark and copyright cases as it was in the cases where it is announced."

Applicable to this case, as in the *Osborne* case, the *Gilchrist* case, and the *Flame* case, is the quotation from *Errion v. Connell*, 9 Cir., 236 Fed. 2d 447, 454:

> "It is alleged in the complaint in our case, and the trial court found, a *single cause of action* involving a *single fraudulent scheme* to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the Federal Court had jurisdiction, and the other non-securities over which the Federal Court normally has no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two lawsuits in this situation is untenable. We, therefore, hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

Petitioner's argument that the application of the rule of ancillary or pendent jurisdiction as expressed in the case of *Hurn v. Oursler* conflicts with the decisions of this Court because of the doctrine of federal preemption is without merit. This specific question has been considered by the Court and has been disposed of, contrary to petitioner's contention, in the cases of *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, and *International Union, U. A., A. & A. I. W. v. Russell*, 356 U. S. 634.

In *Laburnum*, in dealing with the doctrine of federal preemption, and speaking of the federal statute which is before the Court in this action, it was said (p. 666):

> "To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress in that section, authorizes court

action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us."

In *International Union, etc., v. Russell*, 356 U. S. 634, a union and its agent were sued in a state court for malicious interference with an employee's lawful occupation. It was contended that the alleged wrongful acts constituted unfair labor practices under the Labor Management Relations Act 1947, and that there was such federal preemption in this area of legislation as to deprive the state court of jurisdiction. This Court referred to its holding in the *Laburnum* case, and to the contention immediately before it saying (pages 641-642):

"This case is similar to Laburnum in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct which was a tort and also assumed to be an unfair labor practice. The situations are comparable except that, in the instant case, the Board is authorized, under § 10(c) of the Federal Act, to award back pay to employees under certain circumstances. We assume, for the purpose of argument, that the Board would have had authority to award back pay to Russell. Petitioners assert that the possibility of partial relief distinguishes the instant case from Laburnum. It is our view that Congress has not made such a distinction and that it has not, in either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered."

And again, on page 645 of the opinion, the Court stated:

"If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect

grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case."

In the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, this Court distinguished its holding there from its rulings in *Laburnum* and in *United Auto Workers v. Russell*, stating that in those cases "* * * we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." (p. 247.) Here, as in *Laburnum* and *Russell*, the activities of the petitioner were marked with mass picketing, dynamiting, shooting, violence and intimidation. The type of conduct which made the doctrine of federal preemption inapplicable in those cases also makes that doctrine inapplicable in the instant case.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 447

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation and
ASHLO COAL COMPANY, a corporation

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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Supreme Court of the United States

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PETITIONER'S REPLY TO OPPOSITION BRIEF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD

UMW believes its statements of the case and of the evidence in the certiorari petition are both accurate and plenary. It believes, too, that the questions as presented in its petition raises the issues properly.

Further, because UMW believes that answers to arguments and statements advanced in Companies' opposition brief are to be found in the certiorari petition, no attempt will be made to reply, *seriatim*, thereto. However, the following discussions have relevancy to the Reasons

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The parties will be referred to herein as they were in the certiorari petition. The abbreviation "O.B." refers to Companies' opposition brief, while that of "Pet." refers to the certiorari petition herein and "Pet. App.)" refers to the appendix to that petition. References to pages in the certified appendix record are indicated as "—a". Unless otherwise indicated, all emphases herein are supplied

for Granting the Writ, at the same time challenging Companies' statements, arguments and positions.

UMW's Reply to Companies' Arguments 1(a) and (b).

Answers to Companies' contentions on Arguments 1(a) and (b) [O.B. 17-22, 23-26] are found in UMW's certiorari petition (pp. 29-33, 34-41).

While certiorari is generally not available to review a lower court decision turning *solely* upon an analysis of facts, it is available for reexamination and evaluation of evidence in light of previous decisions of this Court presenting important questions under federal statutes. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320. Such is the present situation where, to sustain a secondary boycott charge supporting money judgments against UMW, the Sixth Circuit has wittingly ignored and refused to utilize criteria established by this Court's *Local 761* (366 U. S. 667), and has sanctioned a jury finding unsupported by evidence and based upon erroneous guides and standards of both union responsibility and liability, discussed in the certiorari petition under Reasons I through IV (Pet. 29-47).

Companies' statement (O.B. 18) that the Sixth Circuit disagreed with UMW's interpretation of this Court's *Local 761* is pure supposition, for the Sixth Circuit's opinion fails to mention *Local 761* despite UMW's argument thereof and its urging that the Sixth Circuit explain if or why it believed *Local 761* to be inapplicable (Pet. 31). Companies' effort (O.B. 18) to limit *Local 761's* applicability to peaceful picketing finds challenge in the Board's *Local No. 5895, United Steelworkers*, 132 NLRB 127, 130, fn. 2 (*now pending on certiorari in this Court as Case No. 925*) [Pet. 30-31].

Companies' effort to cast Companies in the role of a

"neutral" (O.B. 19), overlooks the undisputed fact that both Ashlo and Sunfire refused to sign the Agreement, some Ashlo employees were among the strikers picketing for higher wages via that Agreement (Pet. 32-33), and that Companies' Mathis attested to an attempt by pickets themselves on April 24, 1959, to have him sign the contract (36a). Companies' argument (O.B. 21) they were "neutral" as to other employers *from whom UMW contracts were sought*, just as contracts were sought from Companies, is challenged in UMW's Petition (p. 33). Picketing occurred at the sole entrance provided by Companies for proclaiming the union's dispute with them. If, as Companies urge (O.B. 7), there was picket misconduct toward employees at the Ashlo tipple, this would not "make the picketing secondary" but "emphasizes the *primary objective* of" the picketing. *Local 3, Int. Bro. Elec. Workers*, 144 NLRB No. 100, 54 LRRM 1178, 1181, fn. 12.

Companies' assertion "truckers were undoubtedly neutral" (O.B. 21) is not supported by the Sixth Circuit's opinion and further, as to truck drivers, the uncontradicted evidence is, as related by a District 30 representative, "we wanted them to know that we were on strike, wanted them to join up if they would, wanted them for members if we could get them for members, and we wanted contracts with the operators" (310a). Moreover, the coal brought by truckers to the Ashlo tipple was there processed, loaded in railroad cars, and then sold. Herein delivery of coal clearly related to these activities. As this Court's *Local 761* makes clear, even where secondary employees are involved, if the work performed is related to that of primary employees, there is no statutory violation (366 U. S. 681. "(A)ppealing to neutral employees whose tasks aid the employer's everyday operation" is "traditional primary activity" (366 U. S. 681).

Despite UMW's strong emphasis that implementation of *Local 761's* doctrine to the instant facts required re-

jecting the contention that UMW was guilty of conduct banned by Section 303, the Sixth Circuit's opinion was totally unconcerned and silent thereon.

Companies undertake (O.B. 23-26) to answer UMW's complaint, discussed under Reasons II and III of the certiorari petition (pp. 34-41), that the Sixth Circuit sanctioned a jury verdict of union responsibility and liability without regard to any agency relationship.[2] Disregarding inaccuracies and relevant factual omissions,[3] Companies' statement does not warrant a finding that UMW was responsible for any wrongful conduct. Whereas Companies point out that pickets Stubblefield and Fields were placed in charge by District 30's Combs (O.B. 23), and the record shows that Combs had "information that they were there practically every day" (309a), there is no evidence that any wrongful activity occurred in their presence. Nor does the statement show that Morris was an agent of UMW to warrant attributing to it the burning of the tipple even if Morris burned it (and UMW denies the evidence shows he did). Companies avoid mentioning the Sixth Circuit's admission that "The record discloses no positive evidence of the origin or the originators of the fire" (Pet. 15); and it is

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[2]Companies statement (O.B. 24) of the incident when a trooper stopped the car in which Morris and Turner rode "At 2:45 in the morning" omits the salient factors that they were not near the Ashlo tipple picket line, there is no showing the men were engaged in union activities, and the trooper conceded he did not regard the incident as sufficient to charge either (81a).

[3]Reference by Companies (O.B. 24) of threats by Turner toward truckers, testified to by driver Campbell (90a), fails to state the threat was made at a store a mile and a half from the tipple, as well as Campbell's admission Turner never attempted to harm him, no picket harmed him, and he delivered every load of coal he started with to the Ashlo tipple (90-2a), *as did the other drivers* (Pet. 16-18).

Companies carefully avoid Ruby Baker's admission (Pet. 14-15) of her receipt of cash from Companies' Mathis at the door to her hotel room, although she had never seen Mathis before, of free room and board at the hotel, and that Mathis got her the house in which she resided in Lexington. Nor do Companies undertake to explain why Mathis, sitting in the courtroom when Mrs. Baker, as a witness, thanked "the Good Lord" that someone had been "an angel" (209a), did not attempt to explain his liberality to Mrs. Baker.

notable that Companies do not attempt to answer UMW's complaint that the jury verdict they seek to uphold was premised upon trial court instructions which erroneously equated agency with union membership. Nor did Companies' opposition brief reply to UMW's demonstration (Pet. 34-38) that the trial court guides given to the jury were contrary to decisions of this and other federal courts and the National Labor Relations Board (Pet. 34-36), as well as to the Act's legislative history on agency (Pet. 34). Companies likewise did not undertake to reply to UMW's complaint that, contrary to such authorities, the Sixth Circuit has now created a pattern of "presumption of union responsibility" when acts occur at a time and place where union activity is involved, and so to destroy labor's right to strike by subjecting all strike activity to labor's economic peril (Pet. 38-39). Similarly, Companies do not respond to UMW's charge that the district court erroneously equated agency with union membership in admitting testimony of two doctors' employees (Pet. 36-37), as well as to an incident occurring May 14, after picketing ceased[1] when a trooper stopped the car in which Morris and Turner were riding (Pet. 37). Companies are careful also to ignore, in detailing the damages to other operators' property (O.B. 25), the undisputed facts that no testimony connected any UMW agent therewith and that Companies' witnesses admitted they did not know who had committed these acts (Pet. 25-26, 39). Companies do not deny this lack of identification.

UMW's Reply to Companies' Argument 2.

This Court in *Local 761* verbalized on the difficulty federal courts and the labor board have experienced in

[1]This incident is contained in Companies' statement (O.B. 24) as an incident to show that Morris and Turner were union agents; but the incident is not shown to have had any connection with any union activity, it did not occur on a picket line, and the Sixth Circuit's approval of the trial court's admitting this evidence was *not* on the basis of agency but whether "there was a concert of action between the two individuals" (Pet. 37).

interpreting Section 303. It was voiced also by Circuit Judge Prettyman in *Retail Clerk's Union Local 770* v. *NLRB*, D. C. Cir., 296 F. 2d 368, 374, when, referring to Section 8(b)(4)(A), he said: "*This case brings into focus the difficulties and complexities of administering this section of the statute.*" This demonstrates the positive necessity that a jury charge be given with utmost clarity, precision and completeness. Because Companies added a common-law violation to the complexities attending Section 303, it was vital that the trial court apprise the jury with the distinctions involved so that jurors would have been properly guided.

UMW's answers to Companies Argument 2 (O.B. 27-37) on the insufficiency of UMW's objections are found in its certiorari petition (pp. 41-47).

Companies ignore *City of Knoxville* v. *Bailey*, 6 Cir., 222 F. 2d 520, 529, where exceptions to the trial court's refusal to give special requests were held to meet the requirements of Rule 51, F.R.C.P.

While citing an early Sixth Circuit case holding objections insufficient, Companies ignore subsequent Sixth Circuit's cases sustaining objections where the point was called to the trial court's attention (Pet. 46). In *Westchester Fire Ins. Co.* v. *Hanley*, 6 Cir., 284 F. 2d 409, 418, counsel *merely noted an exception* to the trial court's failure to give requested instructions, yet the Sixth Circuit held it sufficient to save the court's refusal for review. Accord: *Sprinkle* v. *Davis*, 4 Cir., 104 F. 2d 487, where defendant requested, and the court refused an instruction, the appellate court declared, "It is manifest that the objection of the defendant to the charge, as originally prepared, and *the instruction requested*. . .. were sufficient to direct the mind of the court to the legal principle, and to require that a correct instruction be given

. . . " (p. 490). See also *Solomon* v. *U. S.*, 6 Cir., 276 F. 2d 669, where objection was raised when motion for new trial was filed [Pet. 45].

Companies' brief contains no response to UMW's citation of this Court's *Sunkist Growers, Inc.* case (379 U. S. 19, 26-27) [Pet. 46], where counsel had requested instructions refused by the trial court, this Court rejected a contention that objections were waived. Similar silence attends other Sixth Circuit cases (Pet. 47) where that Court evidenced concern because the jury had been improperly charged on material issues. Herein, as to UMW, the Sixth Circuit evidenced no such concern.

Though UMW complained in its petition of the trial court's failure to delineate the criteria enunciated in *Local 761* as essential in holding a labor union guilty of conduct proscribed by the Act Section 303 (Pet. 43-44), Companies' profession that the charge sufficed is to be tested *by their failure to denote specific language covering this vital factor, even in substance.*

Where, as here, there is error in the court's charge, and even though no timely or proper instruction were made—which UMW denies—"the court's error in instructing on a material issue may be the basis for grant of a new trial *. . . when it is apparent that a miscarriage of justice may otherwise occur*". Moore's Federal Practice—Rules and Official Forms, as Amended 1963, p. 925.

In addition to the foregoing errors in the court's jury charge, in the certiorari petition (pp. 34-35, fn. 26) UMW demonstrated that the Sixth Circuit's approval of the jury verdict resulted from permitting the jury to predicate UMW's responsibility and liability upon union members' conduct and thus to equate such membership with agency. Further discussion of such error appears herein

(*ante*, pp. 4-5) where it is pointed out that Companies have not attempted to answer UMW's complaint concerning such error. Had UMW's proffered Instruction No. 2 (to which refusal UMW noted its objections [34a] been granted, this error would not have occurred.

UMW submits that where, as herein demonstrated, UMW responsibility and liability have been based upon erroneous standards and guides, a miscarriage of justice has occurred, thus emphasizing the importance of a review herein.

UMW's Reply to Companies' Argument 3.

UMW's answer to Companies' Argument 3 (O.B. 37-8) is found in the certiorari petition (pp 28, 47-48).

UMW's Reply to Companies' Argument 4.

Answers to Companies' contentions in their Argument 4 (O.B. 39-45) are found in UMW's certiorari petition (pp. 48-55).

Companies incorrectly state (O.B. 39) that the jurisdictional question was disposed of in the *Meadow Creek* and *Osborne* cases[1] since neither concerned a common-law claim in a state which, like Kentucky, would not permit a labor union to be used as such. Even in *Gilchrist*,[2] activities occurred both in Tennessee wherein a union may be sued and in Kentucky, in which it may not be sued, but *Gilchrist* did not discuss the issue.

Companies inaccurately urge (O.B. 40) that voluntary unincorporated associations are considered legal entities

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[1] *UMWA v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U. S. 1013; *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881.

[2] *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36.

in Kentucky.[6] It is noteworthy that Companies fail to reply to UMW's citation (Pet. 52, fn. 39) of *Sweeney* v. *City of Louisville*, 309 Ky. 465, 218 S. W. 2d 30, which rejected an action brought against an association as such.

Companies quote at length from the Sixth Circuit's *Flame* case[7] (O.B. 40-42) in which reliance is had upon *Meadow Creek*, *Osborne* and *Gilchrist*; but such cases did not deal with UMW's contention that federal preemption precludes federal district court jurisdiction of the state common-law tort claim under the doctrine of *Hurn* v. *Oursler* (289 U. S. 238). Since Companies press the district court's jurisdiction of the common-law claim under *Hurn* v. *Oursler*, 289 U. S. 238, a concomitance of consideration must be this Court's reasoning that *Hurn* is justified where both federal and nonfederal claims "so precisely rest upon *identical facts* as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U. S. 246). By enacting Section 303, Congress precluded a nonfederal, state claim or action based on such facts. Nothing contained in Companies' opposition brief explains why this Court's rule of federal preemption does not preclude the implementation of the *Hurn* doctrine.

Companies contend (O.B. 43) that the question of preemption was considered and disposed of contrary to

[6] Companies' reliance upon *Int. Union of Operating Engineers* v. *Bryan*, 255 S. W. 2d 471, 474 (Ky.), *UMWA* v. *Comer*, 159 Ky. 605, 167 S. W. 891, and *Hotel etc. Employees Local Union No. 181* v. *Miller*, 272 Ky. 466, 114 S. W. 2d 501, cited by Companies (O.B. 40) are not supportive of Companies' contention.

In *Operating Engineers*, the court decided only that a non-resident union could be required to produce documents by service of a subpoena duces tecum directed to a resident officer and union representative under the class action statutes (255 S. W. 2d 474).

In *Comer*, there was no objection to the suit by special demurrer or special pleas in abatement for which reason the court permitted judgment to stand.

In *Hotel Employees*, the question of suability was not before the court, which found the union made an appearance to the suit by motion to modify an injunction order.

[7] *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, cert. den. 371 U. S. 891.

UMW's contention in the *Laburnum* and *Russell cases.*[*] Significantly, in its certiorari petition (pp. 49-51), UMW's reasons for *Laburnum's* inapplicability are delineated, and Companies do not answer UMW's contention that, unlike *Laburnum*, which involved the Act's Section 8(b)(1)(A), wherein this Court rejected the preemption doctrine because the Act "sets up no general compensatory procedure", Section 303 specifically so provides. Like *Laburnum*, *Russell* was a state court action; neither involved the issue of diversity of citizenship which is lacking here. Like *Laburnum*, *Russell* held federal preemption inappropriate because the federal act involved did not provide a remedy for recovery of damages for the activities proscribed. Section 303 does so provide, and the Supreme Court so noted in *Laburnum*, declaring (347 U. S. 665):

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims *for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages.* . . ."

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[*] *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656; *International Union U.A.A. etc. v. Russell*, 356 U. S. 634. UMW's reply to Argument 4 applies also to Companies' citation of *Laburnum* and *Russell* under their Argument 2 (O.B. 37) as to UMW's proffered Instruction 5. Moreover, as the certiorari petition notes (Pet. 14), Instruction 5 would have informed the jury that violence is immaterial in a Section 303 charge.

CONCLUSION

For the reasons discussed herein and in the certiorari petition, the writ prayed for therein should issue.

Respectfully submitted,

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